No. 99 850 NOV 16 1999

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In The

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM; CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM BOARD OF ADMINISTRATION; MEMBERS OF THE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM IN THEIR OFFICIAL CAPACITY; STATE OF CALIFORNIA; GOVERNOR GRAY DAVIS; CALIFORNIA DEPARTMENT OF MOTOR VEHICLES; CALIFORNIA YOUTH AUTHORITY and CALIFORNIA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

RONALD ARNETT; HAROLD BAILEY; JIM BEAN; MARGUERETTE HOWARD; JOYCELYN KELLER; WAYNE E. LORD; DIANE S. MILITANO; ANTHONY RYAN; CITY OF FREMONT, CALIFORNIA; CITY OF ORANGE, CALIFORNIA; CITY OF WEST COVINA, CALIFORNIA and COUNTY OF RIVERSIDE, CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether plaintiffs can state a claim for a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, under a disparate impact theory of liability after the Court's decision in *Hazen Paper Company, Inc. v. Biggins*, 507 U.S. 604 (1993).

2. Whether plaintiffs can state a claim for violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, under a disparate treatment theory of liability after the Court's decision in *Hazen Paper Company, Inc. v. Biggins*, 507 U.S. 604 (1993).

LIST OF PARTIES

Petitioners before this Court and appellees in the proceedings below are: California Public Employees' Retirement System ("CalPERS"); the Board of Administration of CalPERS; the individual board members of the Board of Administration of CalPERS in their official capacity; the State of California; Governor Gray Davis; California Department of Motor Vehicles; California Youth Authority; and the California Department of Corrections.

Respondents before this Court and appellants in the proceedings below are: Ronald Arnett; Harold Bailey; Jim Bean; Marguerette Howard; Joycelyn Keller; Wayne E. Lord; Diane S. Militano; and Anthony Ryan. Additional respondents are the cities of Fremont, Orange, and West Covina, California, and the County of Riverside, California.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 17, 1999, as amended on denial of rehearing and rehearing en banc.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 179 F.3d 690, and is reprinted in the Appendix at App. 1 through App. 16.

The orders of the United States District Court for the Northern District of California (Breyer, D.J. and Armstrong, D.J.) are reprinted at App. 17 through App. 43.

STATEMENT OF JURISDICTION

Plaintiffs filed their first amended complaint in the United States District Court for the Northern District of California citing federal jurisdiction under 28 U.S.C. §§ 451, 331, 1337, and 1343. Defendants' motion to dismiss for failure to state a claim thereafter was granted with leave to amend. App. 25. Plaintiffs then filed their second amended complaint and defendants' motion to dismiss for failure to state a claim was granted. App. 17.

On appeal by plaintiffs and appellants, the Ninth Circuit on August 17, 1999, denied the petition for rehearing and rehearing en banc and reversed and remanded

the case to the district court. *Arnett v. California Public Employees' Retirement System*, 179 F.3d 690 (9th Cir. 1999).

The jurisdiction of this Court to review the judgment of the Ninth Circuit is conferred by 28 U.S.C. § 1254(1).[1]

STATUTES INVOLVED

Plaintiffs challenged the calculation of industrial disability retirement benefits as violative of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, (hereinafter "ADEA"). Statutes which are pertinent to the instant proceedings read as follows:

29 U.S.C. § 623(f)(1)

> "It shall not be unlawful for an employer, employment agency, or labor organization – (1) to take any action otherwise prohibited under sections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age,"

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[1] Whether the federal courts have subject matter jurisdiction over state Petitioners for an alleged violation of the ADEA in light of the Eleventh Amendment is an issue presently before this Court in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S.Ct. 901 (1999). Should this Court rule in *Kimel* that Congress did not abrogate the sovereign immunity of the states in enacting the ADEA, Petitioners respectfully urge the Court to summarily dispose of the petition on the merits consistent with the Court's decision in *Kimel*.

Cal. Gov't. Code, § 21411

> "Upon retirement of a state safety member for industrial disability he or she shall receive a disability retirement allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater."

Cal. Gov't. Code, § 21413

> "Upon retirement of a local safety member for industrial disability he or she shall receive a disability retirement allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or if qualified for service retirement, he or she shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater."

Cal. Gov. Code, § 21417

> "Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980, in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if a patrol, state peace officer/firefighter, state

safety, or local safety member, age 65, if service is subject to Section 21076, or age 63, if any other category of member.

This section shall not be applicable to a member who is subject to Section 21430, or a member whose disability results from an injury that is a direct consequence of a violent act perpetrated upon his or her person or occurs during the performance of those portions of his or her duties that are particularly hazardous and dangerous."

STATEMENT OF THE CASE

Plaintiffs are former employees of the State of California or local public agencies who, for purposes of retirement, are classified as "safety members".[2] Plaintiffs were hired after the age of 40, became injured while on the job, and, thereafter, began receiving industrial disability retirement ("IDR") benefits. Plaintiffs claim that the formula used to calculate IDR benefits violates the ADEA because the formula, based in part upon potential years of service, has the effect of providing lower benefits to employees hired at older ages, regardless of their length of actual employment.

Prior to 1980, under the IDR formula then in existence, a safety employee who retired due to an on-the-job

[2] The safety member classification includes patrol members, state peace officer/firefighter members, state safety members, and local safety members. Cal. Gov't. Code, § 20371(b). Unless otherwise noted, all statutory references are to the California Government Code.

injury or illness was entitled to a monthly retirement allowance equal to 50% of that employee's final compensation. §§ 21411 and 21413. On January 1, 1980, however, the Legislature enacted § 21417 as another element of the IDR computation. Since 1980, this entitlement has been qualified by § 21417, the statute plaintiffs now challenge. Section 21417 provides,

> Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980, in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if a patrol, state peace officer/firefighter, state safety, or local safety member, age 65, if service is subject to Section 21076, or age 63, if any other category of member.

Section 21417 provides that the maximum amount of monthly IDR benefits which a safety member can receive is the lesser of: (1) 50% of that employee's final monthly compensation; or, (2) the monthly allowance which the employee would have received as normal service retirement had the employee continued to work until the age of 55.[3]

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[3] Service retirement benefits are calculated to equal a fraction of an employee's final compensation. A monthly service retirement allowance is determined by multiplying 2% of an employee's final monthly salary by the employee's years

Plaintiffs filed their first amended complaint as a class action on March 4, 1996, alleging that § 21417 violates the ADEA because the statute effectively penalizes them for not having started employment as safety members at a younger age. Plaintiffs alleged disparate treatment, asserting that, "by operation of the express terms" of § 21417, their IDR allowances were lower than those of younger employees.

On November 12, 1996, the district court granted state defendants'[4] motion to dismiss for failure to state a claim. App. 25 to App. 43. The court dismissed plaintiffs' disparate treatment claim without leave to amend but granted plaintiffs the opportunity to amend their complaint to allege a disparate impact claim.

On December 17, 1996, plaintiffs filed and served their second amended complaint for injunctive relief, back pay and damages. On March 2, 1998, the district court granted the motions to dismiss and entered judgment in favor of defendants against plaintiffs. App. 17 to App. 24. Although the district court assumed, without

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of service (service credit), and then multiplying the product by a statutory multiplier. For example, under § 21362, a California Highway Patrol officer with 30 years of service, earning, as final compensation, $4,000 per month, and retiring at age 55, would receive the following as a monthly service retirement allowance: 2% x $4,000 (monthly salary) x 30 (years of service) x 1.35 (statutory multiplier under section 21362) = $3,200 per month. Or, stated as a percentage of monthly compensation, the formula is: 2% x 30 (length of service) x 1.35 = 80% of final monthly compensation.

[4] State defendants are the Petitioners herein.

actually deciding, that a disparate impact claim is cognizable under the ADEA, the court held that because the "PERS provisions do not systematically affect older workers . . . plaintiffs [were] unable to state a claim for disparate impact under the ADEA." App. 23.

On appeal, the Ninth Circuit reversed. App. 1 to App. 16. Although the court recognized the Supreme Court's intimation in *Hazen Paper Company v. Biggins*, 507 U.S. 604 (1993) that a disparate impact claim may not be viable under the ADEA, the court stated that it was bound by its prior ruling in *E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641 (9th Cir. 1992), *as amended ("Local 350")*, a case initially decided prior *to Hazen Paper* and amended afterwards. The court thus found that plaintiffs had stated a disparate impact claim. With regard to disparate treatment, the court held that plaintiffs did state a claim for age discrimination because plaintiffs would have received greater retirement benefits but for their ages at hire.

On August 17, 1999, the Ninth Circuit issued its amended opinion and denied defendants' petitions for rehearing and rehearing en banc. The instant petition followed.

ARGUMENT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT DISPARATE IMPACT CLAIMS UNDER THE ADEA REMAIN COGNIZABLE AFTER *HAZEN PAPER* IS IN DIRECT CONFLICT WITH OTHER CIRCUITS

Hazen Paper was a disparate treatment case. Hazen Paper Company fired Walter Biggins shortly before his pension benefits would have vested. The Court, in a unanimous opinion, clarified that disparate treatment does not exist under the ADEA when employment decisions are based upon factors associated or correlated with age, but not directly based upon age. *Hazen Paper*, 507 U.S. at 610. Instead, disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA." As to disparate impact, however, the Court specifically left open the question whether a disparate impact theory of liability is available under the ADEA. *Id.*

Justice Kennedy in a separate concurrence joined by Chief Justice Rehnquist and Justice Thomas, joined in the Court's opinion with the understanding that the Court had not addressed the question whether a disparate impact claim is cognizable under the ADEA. *Id.* at 617-18. Justice Kennedy wrote,

> "I write to underscore that the only claim based upon the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, asserted by respondent in this litigation is that petitioners discriminated against him because of his age. He has advanced no claim that petitioners' use

> of an employment practice that has a disproportionate effect on older workers violates the ADEA. As a result, nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. As the Court acknowledges, *ante*, at 5, we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Hazen Paper*, 507 U.S. at 618. (Citations and record references omitted).

Petitioners now urge the Court to answer the question specifically left open in *Hazen Paper* and now squarely before this Court; that is, whether a disparate impact theory of liability is available under the ADEA.

The Ninth Circuit's ruling exacerbates the existing split in the circuit courts. For instance the First Circuit in *Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir.), *cert. denied*, 120 S.Ct. 44 (1999), the Tenth Circuit in *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996), and the Seventh Circuit in *E.E.O.C. v. Francis Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 2577 (1995) have all held that disparate impact claims are not cognizable under the ADEA.

These circuits, in well-reasoned opinions, analyze why the disparate impact theory of liability is no longer viable after *Hazen Paper*. Primarily, disparate impact analysis is simply irreconcilable with *Hazen Paper's* holding that a claim of age discrimination does not exist when an

employer's decision is motivated by factors that may be correlated with age, as years of service may be. *See Francis Parker School*, 41 F.3d at 1076; *Mullin*, 164 F.3d at 700. The Court acknowledged the possibility that decisions based on years of service may, in fact, fall more harshly on older employees but that this result does not run afoul of the ADEA. *Hazen Paper*, 507 U.S. at 611.

The holding in *Hazen Paper* parallels the classic description of a *prima facie* case of disparate impact liability – a facially neutral policy (i.e. a policy motivated by factors wholly unrelated to age) that falls more harshly on a protected group would be actionable under a disparate impact theory. In other words, conduct that survives a disparate treatment analysis under the ADEA would, *ipso facto*, establish a prima facie case of disparate impact liability. Thus, employers who tailor their conduct to comply with the ADEA as interpreted by *Hazen Paper* would nonetheless still be subject to ADEA lawsuits on a disparate impact theory. This result is nonsensical and clearly not contemplated by either Congress or the Court in *Hazen Paper*.

The literal language of the ADEA itself supports the conclusion that disparate impact liability is not available. The ADEA provides at 29 U.S.C. § 623(f) that differentiation can occur based upon reasonable factors other than age. This language, either alone or construed in combination with other factors discussed herein, preclude disparate impact liability. *Ellis*, 73 F.3d 999, 1007-08; *Francis Parker School*, 41 F.3d 1073, 1077.

Finally, a comparison of Title VII and the ADEA proves that disparate impact was not intended to be

available to ADEA plaintiffs. As the Tenth Circuit noted, the legislative history of the ADEA indicates that it was not enacted to address disparate impact claims. *Ellis*, 73 F.3d 1007. Moreover, subsequent amendments to Title VII specifically added a disparate impact cause of action to Title VII in the 1991 Civil Rights Act, 42 U.S.C. § 2000e-2(k). However, Congress added no such parallel provisions to the ADEA. *Id.* at 1008.

Besides the outright split in the circuits, the viability of the disparate impact theory has been cast into doubt in the Third Circuit, *DiBase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3rd Cir.)), *cert. denied*, 116 S.Ct. 306 (1995) and the Sixth Circuit, *Lyon v. Ohio Education Ass'n and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995). In contrast, the Second Circuit in *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997) and *Criley v. Delta Air Line, Inc.*, 119 F.3d 102, 105 (2d Cir.), *cert. denied*, 118 S.Ct. 626 (1997), the Eighth Circuit in *E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948 (1999) and *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996), and now the Ninth Circuit in *Arnett* have all held that the ADEA does allow for disparate impact claims.[5]

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[5] The Ninth Circuit in *Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1474 (9th Cir. 1995), found that it did not need to address whether disparate impact is a proper theory under the ADEA because the trial court found intentional discrimination using a disparate treatment theory. In *Rose v. Wells Fargo Co.*, 902 F.2d 1417 (9th Cir. 1990), decided prior to *Hazen Paper*, the court, without analysis, found that an employee alleging a violation of the ADEA can proceed under both disparate treatment and impact theories. Both *Mangold* and *Rose* highlight the confusion which exists on this issue.

This split among the circuit courts has caused uncertainty and confusion among those district courts in circuits where the higher courts have yet to squarely address the question. In *Evans v. Atwood*, 38 F.Supp. 2d 25, 29 (D.D.C. 1999), the court held that the ADEA did not allow for disparate impact claims. *See also Fobian v. Storage Technology Corporation*, 959 F.Supp. 742 (E.D. Va. 1997) (disparate impact claims are no longer cognizable under the ADEA). However, in *Browning v. Rohm & Haas Tennessee, Inc.*, 16 F.Supp. 2d 896, 910 (E.D. Tenn. 1998), the district court held that, "[i]n the absence of express statutory language precluding disparate impact claims under the ADEA, or a clear holding of the United States Supreme Court or the Sixth Circuit disallowing such claims, this court will assume, without deciding, that the plaintiffs can raise a disparate impact claim in this age discrimination case."

Accordingly, the petition should be granted to permit this Court to resolve a split among the circuit courts and amongst those lower courts where the appellate court has not rendered a decision.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT RETIREMENT BENEFITS BASED UPON A FORMULA THAT INCLUDES POTENTIAL YEARS OF SERVICE STATES A CLAIM FOR AGE DISCRIMINATION IS IN DIRECT CONFLICT WITH *HAZEN PAPER* AND CREATES A SPLIT AMONG THE CIRCUIT COURTS

This Court in *Hazen Paper* stated that a disparate treatment claim succeeds only when an employee's age

"actually played a role in the process and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S. at 610. However, when an employer's decision is motivated by factors other than age, no claim of age discrimination exists, even if the motivating factor is "correlated with age, as pension status typically is." The Court well-recognized that,

> "[a]n employee's age is analytically distinct from his years of service. . . . Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.' "

Hazen Paper, 507 U.S. at 611.

The Ninth Circuit in *Arnett* found that the formula used to calculate industrial disability retirement benefits was based on "potential years of service." Addressing this question for the first time, the Ninth Circuit concluded that the calculation of "potential years of service" under section 21417 is "a strict function of age" bearing no relationship to other factors that might be correlated with age. *Arnett*, 179 F.3d at 695.

Arnett is in direct conflict with the Sixth Circuit in *Lyon*, 53 F.3d 135. In *Lyon* the court upheld an early retirement provision in a collective bargaining agreement which used potential years of service and a presumed retirement age of 62 to calculate retirement benefits. Employees were eligible to retire after completing either twenty years of service or reaching the age of 60 after five years of service, whichever occurred first. *Id.* at 136. Once having met the eligibility requirement, the employer

would impute additional years of service to the employee to the age of 62. The plaintiff in *Lyon* complained that younger retirees who took early retirement received a higher pension than older persons who retired with the same length of service. *Id.* at 137.

The Sixth Circuit upheld the early retirement provision as not violative of the ADEA. The court found that older employees did not receive lower benefits because of their age. *Id.* at 140. Instead, the court recognized that an employee who begins work when older will necessarily have less time to accumulate years of service, and, therefore, will receive fewer benefits upon reaching retirement age. *Id.* The difference in retirement benefits between employees who commence employment at a younger age as opposed to those who begin work when older is not a result of discrimination against older employees. *Id.* Instead, the court held that any disparity is due to the "actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age of 62." *Id.*

Hazen Paper teaches that employment decisions based upon years of service are permissible. Petitioners, in agreement with *Lyon*, assert that employment decisions based upon potential years of service, are consistent with *Hazen Paper* and, likewise, are permissible. As in *Lyon*, potential years of service are not being used as a "proxy" for age.

Besides the Ninth Circuit's decision in *Arnett*, the split in circuits is reinforced by the Seventh Circuit in *Solon v. Gary Community School Corporation*, 180 F.3d 844 (7th Cir. 1999) where the court held that plaintiffs had

established a prima facie case of age discrimination. In *Solon* plaintiffs challenged an early retirement incentive plan where only employees between the ages of 58 and 61 could receive early retirement incentive pay for up to 48 months, ending at the age of 62.

Based upon the above, this petition should be granted to resolve a split in the circuits and to clarify the type of retirement provisions "correlated with age" and which do not run afoul of the ADEA.

III.

THE PETITION SHOULD BE GRANTED IN ORDER TO RESOLVE AN IMPORTANT FEDERAL QUESTION FOR PUBLIC SECTOR EMPLOYERS

The Ninth Circuit's decision throws into serious doubt the ability of public sector employers to structure retirement plans where varying years of service are imputed to an employee based upon factors which may be correlated with age. Limitations on IDR allowances and early retirement incentive plans are questionable after the *Arnett* decision. Equally as distressful is the confusion left in the aftermath of *Hazen Paper* and *Arnett* – what is a permissible factor correlated with age for purposes of structuring a retirement plan? This uncertainty and attendant inability to plan or implement any employee benefit which may touch upon age directly affects the willingness of employers to provide such benefits in order to attract a workforce. This confusion effectively paralyzes public sector employers for fear of facing costly litigation in the federal courts.

Finally, the potential costs of *Arnett* could be staggering because of the potential number of class members and employers involved. Ultimately, the costs of *Arnett* will be borne by the employers by way of increased costs for retirement contributions, which, in turn, will equate to fewer resources for other services which benefit the public as a whole. Public sector employees, too, may bear the cost of *Arnett* by way of increased employee contributions, making public sector employment less attractive. In turn, public sector employers will be unable to attract the talent, energy, and resources of the best applicant pool for employment.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Dated: November 15, 1999.

Respectfully submitted,

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APPENDIX

Ronald ARNETT; Harold Bailey; Jim Bean; Marguerette Howard; Joycelyn Keller; Wayne E. Lord; Diane S. Militano, Plaintiffs-Appellants,

and

Anthony Ryan, Plaintiff,

v.

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM (PERS); Harry Bubb; Robert Carlson; Richard "Bud" Carpenter; Thomas Clark; Kathleen Connell; Jerry Cremins; William Crist; Michael Flaherman; Matt Fong; William "Bill" Rosenberg; Kurato Shimada; Charles Valdes, strictly in their official capacity as members of the Board of Administration of PERS; State of California, as administrator of the PERS and by and through each of its agencies; California Youth Authority; California Department of Corrections; City of West Covina; Department of Motor Vehicles; City of Orange; Riverside County; City of Fremont, Defendants-Appellees.

No. 98-15574.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 10, 1999.

Filed June 2, 1999.

As Amended on Denial of Rehearing and Rehearing En Banc Aug. 17, 1999.

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Irene K. Tamura, Deputy Attorney General, Sacramento, California, for the state defendants-appellees.

Henry S. Hewitt, Erickson, Beasley, Hewitt & Wilson, Oakland, California, Jeffrey Wertheimer, Jennifer White-Sperling, Rutan & Tucker, LLP, Costa Mesa, California, for the city and county defendants-appellees.

Laurie A. McCann, American Association of Retired Persons, Washington, D.C., for amicus curiae American Association of Retired Persons.

Jennifer S. Goldstein, Equal Employment Opportunity Commission, Washington, D.C., for amicus curiae Equal Employment Opportunity Commission.

Appeal from the United States District Court for the Northern District of California; Charles R. Breyer, District Judge, Presiding. D.C. No. CV-95-03022-CRB.

Before: FERNANDEZ and McKEOWN, Circuit Judges, and WEINER, Senior District Judge.[1]

McKEOWN, Circuit Judge:

This case requires us to address a claim for age discrimination in disability benefits in light of the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

Two individuals are hired as police officers on the same day. One is twenty-five, the other forty-five. A year later, they are injured in the same accident. Under the

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[1] The Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

California Public Employees' Retirement Law, Cal. Gov't Code § 21417, the younger employee receives 50% of final monthly compensation as a disability benefit, but the older employee receives only 20% the difference due solely to their ages at hire. Does a challenge to such a plan state a claim for disparate treatment or disparate impact under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634? We hold that it does, and reverse the district court's grant of motions to dismiss for failure to state a claim and for judgment on the pleadings.

BACKGROUND

Appellants, former police officers, correctional officers and other "safety employees"[2] of the State of California and local agencies (collectively, the "Employees"), brought this class action to challenge calculation of disability benefits under the California Public Employees Retirement System ("PERS," also known as "CalPERS"). The Employees were all hired at age 40 or later and retired from their jobs because of industrial disabilities. Appellees are PERS, the State of California and three local cities and a county which contracted for benefits under PERS (collectively, "PERS"). Employees of state agencies are automatically covered by PERS; local agencies may join PERS to provide benefits for their employees. Cal. Gov't Code §§ 20281, 20300, 20460.

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[2] "Safety employees" is an employment classification that includes, among others, patrol officers, and state peace officers and firefighters. Cal. Gov't Code §§ 20371(b), 20403.

Benefits Under PERS

PERS provides two types of benefits: service retirement benefits for employees who work until a normal retirement age, and industrial disability retirement benefits for employees who are injured on the job and retire with a disability. Under the PERS system, the level of compensation at the time of retirement and actual years of service are the key factors in calculation of service benefits. For example, a safety employee who works until normal retirement age receives benefits calculated as follows:

> monthly service benefits = 2% *x* monthly salary *x* actual years of service *x* statutory multiplier[3]

See, e.g., Cal. Gov't Code §§ 21362, 21363. Thus, an employee who worked twenty-five years before retiring would receive 50% of final monthly compensation as service retirement benefits (2% *x* 25 years), whereas an employee who retired after working 13 years would receive 26% of final compensation (2% *x* 13 years).

Disability retirement benefits are calculated according to a different formula from service benefits. Until 1980, an employee's final compensation was the only variable in computing disability retirement benefits. Under California Government Code section 21292.5,[4] any safety employee injured on the job received 50% of final

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[3] The multiplier ranges from 1.0 to 1.35, depending on the employee's age at retirement, and, for safety employees, does not increase after age 55. Because the parties agree that the effect of the multiplier is irrelevant to this appeal, we omit it from further consideration and discussion.

[4] The statute was recodified as section 21411 in 1995.

compensation as a disability benefit, regardless of age or the number of years of actual service:

> Upon retirement of a state safety member for industrial disability he or she shall receive a disability retirement allowance of 50 percent of his or her final compensation. . . .

In 1980, the California Legislature enacted section 21292.6 (now recodified as section 21417) to provide a limitation on this flat percentage:

> Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member . . . shall not exceed the service retirement allowance that would be payable as a result of service . . . if the member's service had continued to age 55, if [the employee is] a patrol, state peace officer/firefighter, state safety, or local safety member. . . .

Cal. Gov't Code § 21417.

Under the new statutory scheme, a safety employee injured on the job receives the lesser of (1) 50% of final compensation, or (2) the amount that employee would have received in service retirement benefits had the employee continued to work until the age of 55. In order to derive this latter amount, section 21417 imposes a statutory ceiling of 55 – a presumed, but not mandatory retirement age under California law – and calculates an employee's "potential years of service" by subtracting the employee's age at hire from 55. The final compensation and "years of potential service" are the key variables in the calculation. The formula can be expressed as follows:

> monthly disability benefits = 2% x monthly salary x (55 – age at hire)

If the "potential years of service" calculation is less than 50%, the employee will receive only the lower amount as a disability retirement benefit, not the otherwise available 50%.[5]

In mathematical terms, then, section 21417 limits disability retirement benefits to the *lesser* of 50% or 2% *x* (55 – age at hire). The *only* variable that matters in the calculation is the employee's age at hire.

District Court Proceedings

In their First Amended Complaint, the Employees alleged that section 21417 violates the ADEA under a disparate treatment theory because it reduces disability benefits based solely upon workers' ages at hire. The district court disagreed and granted the motions to dismiss and for judgment on the pleadings, holding that the Employees failed to state a disparate treatment claim under *Hazen*. The court granted leave to amend the complaint to allege a disparate impact claim. The district court then dismissed that claim, finding that ADEA regulations authorized the statutory scheme in section 21417,

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[5] For example, if an employee were hired at 38 and later injured on the job, section 21417 would presume 17 "potential years of service" (55-38). Because 2% *x* 17 = 34%, which is less than the statutory default amount of 50%, the injured employee would receive only 34% of final compensation as a disability retirement benefit. An employee hired at 42 and injured on the job would receive only 26%. Successive calculations demonstrate that it is the age at hire, not actual years of service or any other variable, that is determinative of the benefit calculation.

and alternatively, that the benefit differential was justified by "business necessity."

STANDARD OF REVIEW

Because this case comes to us after dismissal pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c), we review the district court's decisions de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir.1998) (dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6)); *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir.) (judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c)), *cert. denied*, ___ U.S. ___, 119 S.Ct. 444, 142 L.Ed.2d 399 (1998).

DISCUSSION

The ADEA prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1). As the Supreme Court has noted, "[t]he Courts of Appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor . . . that is empirically correlated with age." *Hazen*, 507 U.S. at 608, 113 S.Ct. 1701. Here we consider whether "potential years of service" under section 21417 is equivalent to "actual years of service," which, according to *Hazen*, is merely empirically correlated with age and does not violate the ADEA.

I. Disparate Treatment

The parties dispute the significance of *Hazen*. The Employees claim that it is irrelevant. This position underestimates the teaching of *Hazen*. Conversely, PERS argues that *Hazen* is dispositive, because "potential years of service" under section 21417 = is merely a permissible variant of the "actual years of service" standard countenanced by the Supreme Court. *Hazen*, however, does not extend so far.

In *Hazen*, the employer terminated a 62-year old employee who was a few weeks shy of having his pension vest. The Supreme Court held that firing an employee "solely because he has nine-plus years of service and therefore is 'close to vesting' would not constitute discriminatory treatment on the basis of age," regardless of the fact that older employees are more likely to be "close to vesting" than their younger counterparts. *Id.* at 611-12, 113 S.Ct. 1701. When an employer acts on the basis of years of service, a factor that is merely "empirically correlated" with age, *id.* at 608, 113 S.Ct. 1701, a disparate treatment claim must fail:

> When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age. . . .

Id. at 611, 113 S.Ct. 1701 (emphasis in original). The Court went on to explain that age is "analytically distinct" from years of service because a younger employee "may have worked for a particular employer his entire career, while an older worker may have been newly hired." *Id.*

In exempting employment decisions based on actual years of service from liability under the ADEA, however, the Court expressly stated that it was not addressing the "special case" where an employee's pension vests *"as a result of* his age. . . . " *Id.* at 613, 113 S.Ct. 1701 (emphasis added). We are now squarely presented with the "special case" left undecided in *Hazen* – a plan under which employment benefits differ solely "as a result of" age. Whereas the employer in *Hazen* did not violate the ADEA because a decision based on actual years of service permits the employer to "ignore an employee's age," *see id.* at 612, 113 S.Ct. 1701, the calculation of "potential years of service" under section 21417 is *entirely* a function of the employee's age at hire. *See* Cal. Gov't Code § 21417 (calculating disability benefits at 2% *x* (55 – age at hire)).[6]

The net effect of section 21417 can be illustrated as follows:

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[6] The use of 55 as an artificial ceiling further exacerbates the disparity between the benefits provided to younger and older employees. Under PERS' current scheme, a safety employee hired at the age of 45 but injured one year later would receive only 20% of final compensation as a disability retirement benefit [2% *x* (55-45)]. If the ceiling were 65, the mandatory retirement age for state safety members, *see* Cal. Gov't Code § 21132, the employee would instead receive 40% of final compensation as a disability retirement benefit [2% *x* (65-45)]. Of course, an employee hired before the age of 30 would always receive 50% of final compensation as a disability benefit regardless of the ceiling.

Employee's Age at Hire	Disability Benefit Prior to Section 21417	Disability Benefit Under Section 21417
30	50%	50%
35	50%	40%
40	50%	30%
45	50%	20%
50	50%	10%

The question, then, is whether "potential years of service" under section 21417 is analytically equivalent to "actual years of service" under *Hazen*. We hold that it is not. In asserting that "potential years of service" for disability retirement benefits is merely a derivative of the "actual years of service" standard for service retirement benefits, PERS ignores one critical fact: while actual years of service may *tend* to be "empirically correlated" with age, *Hazen*, 507 U.S. at 608, 113 S.Ct. 1701, the calculation of "potential years of service" under section 21417 is a strict function of age. It bears no relationship to length of service, seniority or other factor that might permissibly be "empirically correlated" with age. Were we to credit PERS' argument that section 21417 simply equates disability retirement benefits with service retirement benefits, we would be elevating form over substance. The practical application of section 21417 leaves no doubt that age at hire, not actual years worked or any variant thereof, is the sole basis for lower benefits.

Section 21417 thus represents the photographic negative of *Hazen*, which does not immunize PERS' age-based

benefits plan. *Hazen* teaches that disparate treatment occurs when " 'the employer treats some people less favorably than others because of race, color, religion [or other protected characteristics].' " *Hazen*, 507 U.S. at 609, 113 S.Ct. 1701 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)) (bracketed material in original). This circuit has adopted a "but for" test in analyzing disparate treatment claims under the ADEA. *See E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 646 (9th Cir.1992) ("*Local 350*") ("[A]n employer discriminates 'because of' age [in violation of ADEA] whenever age is a 'but for' cause of discrimination.") (quoting *E.E.O.C. v. Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir.1984)).[7] It is unquestionable that the Employees would have received greater disability retirement benefits but for their older ages at hire. *Id.*; *see also Huff v. UARCO, Inc.*, 122 F.3d 374, 388 (7th Cir.1997) (policy violates ADEA where "age is an express condition of receiving a benefit," and "[b]ut for the age-related restriction," certain older workers would have received a benefit available to other employees). Under *Hazen* and *Local 350*, the Employees stated a disparate treatment claim.

We next address PERS' additional arguments supporting dismissal. PERS contends that the Employees cannot complain about lower disability benefits because

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[7] Because the Sixth Circuit does not follow this circuit's "but for" test of discrimination, PERS' reliance on *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135 (6th Cir. 1995), is misplaced. Lyon is also distinguishable on its facts. *See infra* at n. 8.

they "voluntarily" chose to begin work at a later age. This argument not only ignores the reality of the modern workforce, it conflicts with our rejection of precisely the same argument in *Local 350*. *See Local 350*, 998 F.2d at 646 (rejecting the argument that a policy which discriminated against retirees did not violate the ADEA because those individuals voluntarily decided to retire). PERS further claims that the system presumes that the younger employee, having been in the workforce less time than an older hire, does not have other resources to count on, "unlike an employee who begins work in the public sector later in life." Not only is this wholly speculative, since many employees first enter the workforce later in life, it epitomizes precisely the sort of class-based assumptions that the Supreme Court has repeatedly rejected. *See, e.g., Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (employer violates Title VII's prohibition on discrimination against individuals where employer's retirement contribution scheme assumes that women generally live longer than men).

PERS finally argues that the Employees failed to state a claim because section 21417 was enacted for economic, not discriminatory reasons. Guided by *Hazen*, we note that "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . In a disparate treatment case, liability depends on whether the protected trait . . . actually motivated the employer's decision." 507 U.S. at 609, 610 (internal quotation marks and citations omitted). We decline to make any such determination on appeal

from a 12(b)(6) dismissal. Both sides invoked the legislative history to support their position. For example, the Employees offered a memorandum from the legislative bill file of the Senate Public Employees and Retirement Committee which explained that "[t]he members affected would be those first [hired] at advanced ages," as well as a letter from the California State Employees Association to the sponsor of section 21417 commenting on the perceived unfairness of section 21417: "[A] person who becomes industrially disabled . . . would have the same needs, regardless of age."[8] PERS countered with a Legislative Analyst's report to show that section 21417 was intended to be a cost-saving measure: "[T]his bill is expected to reduce future PERS program retirement costs." Although the Employees have met the threshold pleading requirements for a disparate treatment claim, the necessity of establishing a discriminatory motive highlights the factual nature of the dispute, making the case inappropriate for dismissal at this early stage. *Cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)

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[8] While such documents might support the Employees' position that the Legislature knew of and intended the discriminatory effects, *see Borden's*, 724 F.2d at 1393 ("[T]he discrimination was intentional in the sense that Borden purposefully drafted its . . . policy to have this effect. We need look no further for the intent necessary to support a finding of discrimination under the disparate treatment theory."), we do not decide that issue here. We note, however, that this evidence from the legislative history distinguishes this case from *Lyon*. *See Lyon*, 53 F.3d at 139 (noting that "[t]here was no evidence that either defendant intended . . . to discriminate against older employees").

(determining whether "discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").

II. Disparate Impact

The district court also erred in dismissing the Employees' disparate impact claim in reliance on "applicable age discrimination regulations"[9] and on grounds of "business necessity." A threshold question is whether disparate impact theory survives *Hazen*. In *Local 350*, we explicitly held that disparate impact claims remain cognizable under the ADEA after *Hazen*:

> We perceive no conflict between *Hazen* and our decision in this case. . . . [I]n this circuit a plaintiff may challenge age discrimination under a disparate impact analysis. . . .

998 F.2d at 648 n.2 (as amended on reconsideration). While we recognize the Supreme Court's intimation that a disparate impact claim may not be viable under the ADEA,[10] we are bound, PERS' arguments notwithstanding, by *Local 350's* express reaffirmation of disparate

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[9] The district court did not cite any specific regulations, but the only relevant one is inapplicable here. Although an employer is entitled to distinguish among employees by years of service as long as that distinction is made "without regard to age," *see* 29 U.S.C. § 623(i)(2); *see also Quinones v. City of Evanston*, 58 F.3d 275, 278-79 (7th Cir.1995), that regulation does not defeat the Employees' claim because section 21417 limits benefits on the sole basis of age.

[10] *See Hazen*, 507 U.S. at 610, 113 S.Ct. 1701 ("[W]e have never decided whether a disparate impact theory of liability is

impact theory. *See In re Visness*, 57 F.3d 775, 778 (9th Cir.1995).

Having alleged that the consequences of section 21417 fall more harshly on "those employees hired at age 40 and over," and documenting the impact of the benefit calculations,[11] the Employees adequately stated a disparate impact claim. *See Hazen*, 507 U.S. at 609, 113 S.Ct. 1701; *see also Pfaff v. United States Dept. of Hous. and Urban Dev.*, 88 F.3d 739, 745 (9th Cir.1996) (prima facie case of discrimination under a disparate impact theory requires plaintiff to show " '(1) the occurrence of certain outwardly neutral . . . practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices' ") (bracketed material in original) (quoting *Palmer v. United States*, 794 F.2d 534, 538 (9th

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available under the ADEA. . . . Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."). *See also, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir.1999) (holding that disparate impact claims are not cognizable under the ADEA); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir.1996) (same); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir.1994) (same).

[11] The district court suggested that section 21417 actually adversely impacts younger employees, because younger disabled employees would have received far more than 50% of their salary as disability benefits in absence of the limitation in section 21417. This is incorrect. The default amount for disabled employees is 50%, unless section 21417 applies to *limit* the employee to an amount *lower* than 50%. *See, e.g.*, Cal. Gov't Code §§ 21411, 21417. A younger employee would therefore always receive the default amount of 50%, no more, and would be unaffected by section 21417's limitation.

Cir.1986)); *Local 350,* 998 F.2d at 648 n. 2 (EEOC's challenge to a policy which adversely affected only retirees is cognizable under a disparate impact theory).

It is true that a disparate impact claim fails where a practice can "be justified by business necessity," *see Hazen,* 507 U.S. at 609, 113 S.Ct. 1701, and that PERS defends section 21417 as an effort to save costs. PERS argues that section 21417 was directed at reducing the high cost of providing disability retirement benefits at a rate of 50% of final compensation to employees who, because they began working later in life, would likely never have accumulated enough "actual years of service" to reach that amount in service retirement benefits. On the record before us, whether such a rationale constitutes a sufficient "business necessity" cannot be determined on a motion to dismiss, and the district court erred in dismissing the Employees' disparate impact claim at the pleading stage. *Cf. Gilligan v. Jamco Dev. Corp.,* 108 F.3d 246, 250-51 (9th Cir.1997) (on the record before the court, business necessity defense not appropriate basis for dismissal of disparate impact claim at pleading stage).

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ARNETT, et al.

Plaintiffs,

v.

CA EMPLOYEES' RETIREMENT, et al.,

Defendants.

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No. C95-03022 CRB

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

(Filed Mar. 02, 1998)

Before the Court are defendants' motions to dismiss plaintiffs' disparate impact claim under the Age Discrimination in Employment Act ("ADEA"). Plaintiffs allege that the California Public Employee Retirement System ("PERS") industrial disability retirement allowance improperly discriminates on the basis of age. The Court previously dismissed plaintiffs' disparate treatment claim with prejudice but granted plaintiffs leave to amend the complaint to allege a disparate impact claim under the ADEA. (Hon. Saundra Brown Armstrong). The Court, having read the briefs and declarations submitted by the parties, GRANTS defendants' motions for the reasons articulated by the Court at the hearing on these matters and for the reasons stated herein.

The PERS Disability Retirement Allowance Does Not Violate the ADEA

a. Background

Plaintiffs are a class of California employees subject to the PERS provisions in California Government Code sections 21406 et seq., section 21417, and related sections of the code. The plaintiffs' allegations focus on the cap imposed under the PERS disability retirement allowance. *See* California Government Code § 21417. In essence, that section limits an employee's disability allowance under PERS to the *lesser* of: 50 percent of final compensation or an amount determined by a formula which calculates the service pension an employee would have earned had they worked until retirement age. Various other provisions provide the projected retirement age, which ranges from age 55 to age 65 depending on the class of job which the employee held.[1]

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[1] Section 21362 provides the formula for calculation of the service pension for local safety members: years of service, multiplied by two percent, multiplied by a statutory multiplier determined by age at retirement. The number provided by this formula indicates the percentage of final compensation received by a local safety member upon normal retirement. Section 21413 provides that a local safety member shall receive a disability retirement allowance of 50 percent of their final compensation. Section 21417, however, modifies the disability allowance by capping that amount at the *lesser* of 50% or an amount calculated by the potential years of service from the age the employee was hired, multiplied by two percent, multiplied by the statutory multiplier. For the purposes of this motion, the court will utilize the parameters set forth by the parties in their pleadings; the parties assumed that retirement age was set at 55 and that the statutory multiplier was 1.35. For numerical examples, see footnotes two and three.

For example, the plaintiffs contend that an employee who was hired at age 40 and became injured soon thereafter would receive approximately 40 percent of final compensation as disability retirement. Conversely, an employee hired at age 25 who immediately became injured would receive the full 50 percent allotted by the PERS disability program. Overall, the provisions operate so that as the age at hiring increases, the percentage disability allowance decreases. Plaintiffs contend that these provisions work to "deprive these individual plaintiffs and other members of the class of public safety officers hired after reaching the age of 40 of equal employment opportunities and benefits; and to otherwise adversely affect their status as former employees entitled to industrial disability benefits." (Complaint, ¶ 60).

"A disparate impact claim [under the ADEA] challenges employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1423-24 (9th Cir. 1990) (quotations omitted). A motion to dismiss should not be granted unless it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For purposes of such a motion, the complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. *Everest and Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All reasonable inferences are to be drawn in favor of the plaintiff.

b. Cognizability of a Disparate Impact Claim Under the ADEA

For the purpose of defendants' motions to dismiss, the Court assumes that the plaintiffs may challenge age discrimination under a disparate impact analysis. Although the Ninth Circuit has yet to address this issue in detail, previous decisions have permitted plaintiffs to state such a claim under the statute. *See, e.g., Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1473-74 (9th Cir. 1995); *EEOC v. Local 350*, 998 F.2d 641, 648 n.2 (9th Cir. 1993). Accordingly, the Court assumes, without actually deciding, that a disparate impact claim is cognizable under the ADEA.

c. The Cap on Disability Allowance Does Not Discriminate on the Basis of Age

The plaintiffs' focus their argument on the cap imposed by section 21417. As noted, that section prevents employees hired over the age of 40 from receiving the 50 percent disability allowance provided to employees who start at a younger age. Plaintiffs contend that this bar creates a disparate impact which constitutes impermissible age discrimination.

Initially, an anomaly exists in the plaintiffs' argument that section 21417 discriminates against employees hired over age 40. Although the PERS provisions affect older workers, they also sharply limit the potential disability allowance of those employees who are hired in their twenties. For example, section 21413 sets a 50 percent limit on the disability allowance of an employee hired at

age 25. Absent this provision, that employee would be eligible to receive approximately 80 percent of their final salary.[2] Thus, the 50 percent cap imposed by 21413 and similar sections markedly limits a 25 year old's disability allowance. The Court finds it hard to reconcile this impact on younger employees with the plaintiffs' claim that the PERS disability program impermissibly discriminates against older workers.

Plaintiffs argue however, that section 21417 unfairly limits older employees' disability allowances; barring those hired after 40 from reaching even the 50 percent cap imposed on younger workers.[3] Plaintiffs contend that this disparity evidences the discriminatory impact of the provision because the employee's age at hire is the only variable considered in the cap. The Court finds this argument unpersuasive. The entire PERS disability allowance operates in the same manner as the PERS service pension program, a provision with which the plaintiffs do not take issue. Indeed, both the Seventh and Eighth Circuits have upheld similar pension provisions in the face of age discrimination claims. *See Quinones v. City of Evanston*, 58 F.3d 275, 278-79 (7th Cir. 1995) (holding that the ADEA "preserves employers' right to distinguish among employees by the years of service, even though years of service are related to age"); *Atkins v. Northwest Airlines Inc.*, 967 F.2d 1197, 1201 (8th Cir. 1992).

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[2] This amount is calculated by subtracting 55, the hypothetical retirement age, from 25, the employee's age at hire, multiplied by two percent, multiplied by the statutory multiplier; (30 x 2% x 1.35 = 81%).

[3] E.g., (55-40=15), thus 15 x 2% x 1.35 = 40.5%.

In bringing this claim, plaintiffs ignore the foundation for disability-related provisions. Because the employee has been disabled, employers must base pension calculations on certain factors which could not be know [sic] at the time of the disability, e.g., actual age at retirement. Unless the employer wishes to provide a uniform disability allowance for all employees, such provisions must utilize a hypothetical retirement age. An employee's age at hire must necessarily factor into this equation, whether the retirement age is set at 55 or 95. In all cases using this system, the younger the employee's age when they start work, the greater the pension they will receive upon suffering a disability.

Although the PERS disability provisions do limit the allowance received by older workers and do so based solely and explicitly on the age of those workers, those provisions are entirely permissible under the applicable age discrimination regulations. To hold differently would run counter to the standard, accepted practice in this area. *See Quinones*, 58 F.3d at 278-79. The plaintiffs do not state a basis for a disparate impact claim under the ADEA.

d. The Provisions Address a Legitimate Business Interest

Alternatively, the state's artculated purpose in enacting this provision, reducing future retirement costs, comports with nondiscriminatory goals accepted under the ADEA. Employees may not use a disparate impact claim to attack employment practices which are justified by business necessity. *See Abbott v. Federal Forge, Inc.*, 912

F.2d 867, 875 (6th Cir. 1990). In *Abbott*, the court upheld an employer's moratorium on hiring older workers who demanded credit for past seniority pension benefits. The court held that "[m]inimizing the cost of labor is a legitimate business consideration." *Id.* In doing so, the court stressed that a cost saving measure can still impose a disparate impact if it "systematically and adversely affects older employees or employment applicants." Here, the legislature asserted cost-saving concerns as its basis for enacting the PERS provisions. *See* Analysis of Senate Bill No. 434, dated May 1, 1979, prepared by the Legislative Analyst, State Defs.' Req. for Jud. Notice Ex. A. The plaintiffs do not contend that the provisions have not achieved this purpose. As the PERS provisions do not systematically affect older workers, the Court finds that they were enacted for a legitimate business necessity. Accordingly, plaintiffs are unable to state a claim for disparate impact under the ADEA.

IT IS SO ORDERED.

Dated: 3-2-98

/s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ARNETT, et al.
Plaintiffs,
v.
CA EMPLOYEES' RETIREMENT, et al.
Defendants.
_____/

No. C95-03022 CRB

JUDGMENT

(Filed Mar. 02, 1998)

The Court having granted defendants' Motions to Dismiss by Order dated March 2, 1998, it is hereby ordered that Judgment be entered in favor of defendants against plaintiffs.

IT IS SO ORDERED.

Dated: 3/2/98

/s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RONALD ARNETT, et al. Plaintiffs, vs. CALIFORNIA PUBLIC RETIREMENT SYSTEM (PERS), et al. Defendants.	No. C 95-3022 SBA ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS (Filed Nov. 12, 1996)

Plaintiffs are former state and local public safety employees who entered public employment at or over the age of 40 and eventually received disability benefits under the California Public Retirement System ("PERS"). They allege that the PERS' method of determining disability benefits violates the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, et seq.

The parties are presently before the Court on the state defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and the municipal defendants' motion for judgment on the pleadings pursuant to Rule 12(c).[1] Having read and considered the papers submitted in connection with these matters, and being fully

[1] The "state defendants" are: PERS; California Board of Administration of PERS; Harry Bubb, Robert Carlson, Richard "Bud" Carpenter, Thomas Clark, Kathleen Connell, Jerry Cremins, William Crist, Michael Flaherman, Matt Fong, William "Bill" Rosenberg, Kurato Shimada, David Tarapelle, and

informed, the Court GRANTS defendants' motions and dismisses plaintiffs' ADEA claim for disparate treatment.[2]

BACKGROUND

A. Overview

The PERS is a statewide system which state and local agencies may join to provide retirement benefits and disability retirement benefits for their employees. Cal. Gov't Code § 20460. The PERS' safety member classification includes "patrol members, state peace officer/firefighter members, state safety members, and local safety members." Cal. Gov't Code § 20371(b).

Plaintiffs, Ronald Arnett, Harold Bailey, Jim Bean, Marguerette Howard, Joycelyn Keller, Wayne E. Lord and Diane S. Militano, are former state and local safety employees who were hired at the age of 40 or older. Plaintiff's former employers participate in and are members of the PERS. Each of the plaintiffs in this action suffered job-related injuries and became eligible to

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Charles Valdes, strictly in their official capacity as Members of the Board of Administration of PERS; State of California, as an employer and administrator of the PERS, and by, and through each of its agencies and political subdivisions; Governor Pete Wilson, in his official capacity as Governor of the State of California; California Department of Motor Vehicles; California Youth Authority; and the California Department of Corrections. The "municipal defendants" are: the City of Orange; the City of Fremont; and the City of West Covina; and the County of Riverside.

[2] Pursuant to Civil Local Rule 7-1(b), the Court adjudicates the instant motions without oral argument.

receive an "industrial disability retirement allowance" (or "disability retirement allowance") throughout their disability. Plaintiffs allege that the PERS' method of calculating disability retirement allowances is discriminatory because the older the worker is, at the time of hiring, the smaller his or her disability retirement allowance. To properly analyze plaintiffs' claims, it is first necessary to briefly review the PERS' method of determining service retirement and disability retirement allowances.

B. PERS' Method of Determining Retirement Benefits

1. General

The provisions governing the administration of the PERS are set forth in the California Government Code §§ 20000, et seq. The PERS governs the payment of service retirement benefits and disability retirement benefits for those state and local agencies which have elected to participate in the system. *See* Cal. Gov't Code §§ 21350-21388 (retirement for service); §§ 21400-21432 (disability retirement benefits). *Service* retirement benefits are those benefits payable to an employee who works until and retires at normal retirement age. *Disability* retirement benefits refer generally to those benefits which the employee receives as a result of retiring due to a disability.

2. Service Retirement Benefits

The calculation of normal service retirement benefits for state and local safety members is governed by the

California Government Code. *E.g.*, Cal. Gov't Code § 21362 (patrol members and local safety members); § 21363 (state peace officer/firefighter members). Service retirement benefits (often referred to as the "service retirement allowance") are calculated to equal a certain fraction of the employee's "final compensation." *See City of Sacramento v. Public Employees Retirement Sys.*, 229 Cal. App. 3d 1470, 1478 and n.5 (1991) (citing Cal. Gov't Code §§ 21252.01 and 21252.02, now renumbered §§ 21362 and 21363, respectively).[3] Specifically, retirement allowances are determined by multiplying 2% of an employee's final salary by the employee's years of service (service credit), and then multiplying the product by a statutory multiplier. The statutory multiplier varies depending on the employee's age at retirement. *Id.*[4] For example, under section 21362, the service retirement allowance for a patrol or local safety member who has 18.5 years of service who retires at age 55 is calculated as follows: 2

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[3] Effective January 1, 1996, the provisions governing the PERS were recodified and renumbered. California Government Code §§ 21294 (industrial disability for local safety member), 21292.5 (industrial disability for state safety member) and 21292.6 (amount of industrial disability for membership commencing after January 1, 1980) were repealed in 1995 and replaced with California Government Code §§ 21411, 21413 and 21417, respectively. All statutory references are to the California Government Code unless otherwise stated.

[4] Under section 21362, the statutory multiplier for patrol and local safety members ranges from 1.00 (retirement at age 50) to 1.35 (retirement at age 50 and over). Cal. Gov't Code § 21362. Under section 21363, the statutory multiplier for state peace officer/firefighter and certain local safety members ranges from 1.00 (retirement at age 50) to 1.25 (retirement at age 55 and over). *Id.* § 21363.

percent x final salary x *18.5* (years of service) x *1.35* (statutory multiplier = a service retirement allowance of *50 percent of his final compensation.*[5]

3. Disability Retirement Benefits

An employee who falls within the safety member classification who retires on disability would be entitled to an industrial disability allowance equal to 50 percent of his or her final compensation. Cal. Gov't Code §§ 21411; 21413. Section 21411 provides:

> Upon retirement of a state safety member for industrial disability he or she shall receive a disability retirement allowance of *50 percent of his or her final compensation* plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater.

(Emphasis added); *see also* Cal. Gov't Code § 21413 (same language as section 21411 except replaces "state safety member" with "local safety member"). Thus, it is possible that an employee could receive a *greater* amount of pension benefits by retiring on the basis of disability than if he or she had worked until normal retirement age.

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[5] As noted, the statutory multiplier varies depending on the employee's age at retirement. Thus, in the above example, if the employee retired at age 50 instead of fifty-five, the statutory multiplier would be *1.00* instead of *1.35*. *See* Cal. Gov't Code § 21362. The specific multiplier also varies depending on the employee's classification. *Compare id. with id.* § 21363.

To address this disparity, the California Legislature modified the statutory provisions governing payment of industrial retirement allowances by enacting California Government Code § 21292.6, now renumbered as section 21417. Section 21417 states, in relevant part:

> Notwithstanding any other provision of this part, *the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980,* in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, *shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if a patrol, state peace officer/firefighter, state safety,* or local safety member, age 65, if service is subject to section 21076, or age 63, if any other category of member.

(Emphasis added). This statute became effective on January 1, 1980.

In essence, section 21417 limits the industrial disability allowance to the *lesser* of either (1) 50 percent of the employee's final compensation or (2) the employee's service retirement allowance projected to service retirement age of 55. With regard to the latter alternative, the industrial disability allowance is calculated by (1) subtracting the age of the employee at the time of hiring from the age of 55, and (2) multiplying the difference by a statutory multiplier to be determined by the employee's job

category.[6] The net effect of section 21417 is that only employees hired at the age of 30 and under will be able to qualify for disability retirement benefits equal to 50 percent of their final compensation. In contrast, employees hired over the age of 30 are effectively foreclosed from obtaining the full industrial disability retirement allowance (i.e., 50 percent of a member's final compensation).

C. Procedural

Plaintiffs commenced the instant proposed class action lawsuit on August 28, 1995. On March 4, 1996, plaintiffs filed their First Amended Complaint alleging a claim for disparate treatment under the ADEA.

Plaintiffs allege that the PERS' method of calculating disability retirement allowances discriminates against those employees who begin employment after the age of 30. According to plaintiffs, the net effect of section 21417 is that workers hired over the age of 30 will never be able to realize the statutory 50 percent maximum retirement allowance.[7] Plaintiffs allege that section 21417 was enacted because of misconceptions and stereotypes regarding older workers, as evidenced by the face of the statute, the legislative history underlying its enactment,

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[6] For example, based on the above formula, plaintiff Militano's IDA is calculated as follows: (55 years - 54.5 years of age at time of entry) x 2% = 27%.

[7] As will be set forth below, the ADEA protects individuals over the age of *40*. All plaintiffs allege that they were hired at the age of 40 and above.

and two separate findings by the Equal Employment Opportunity Commission in favor of plaintiffs Arnett and Militano. The First Amended Complaint seeks injunctive relief, back pay and damages.

The state defendants have filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Defendants City of West Covina, City of Orange and City of Fremont have filed a motion for judgment on the pleadings under Rule 12(c). Defendant County of Riverside has filed a joinder in the motion for judgment on the pleadings. The crux of these motions is that section 21417 is not discriminatory, because *years of service*, not age, is the determinative factor in calculating disability retirement allowances. Plaintiffs have filed oppositions to these motions and defendants have filed replies thereto.[8]

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[8] Plaintiffs have violated several Local Rules of this Court. First, plaintiffs' opposition briefs exceed ten pages in length, but do not contain a table of contents or table of authorities as required by Civil Local Rule 7-4(a)(2). Second, plaintiffs filed a lengthy letter brief purporting to respond to defendants' reply briefs. Surreply briefs are not authorized under the Civil Local Rules and plaintiffs failed to otherwise seek leave of Court before filing their letter. Said papers are stricken and will not be considered by the Court. Finally, plaintiffs attach a chart entitled "Amount of IDR Pension" as Exhibit "A" to their opposition to the state defendants' motion to dismiss. The state defendants object to this exhibit on the ground that it is not properly authenticated. Civil Local Rule 7-5(a) requires that "evidentiary matters must be appropriately authenticated by an affidavit or declaration." Since the exhibit fails to comport with this rule, the Court sustains the state defendants' objection. Plaintiffs are warned that further violations of the Local Rules or any order of this Court will be deemed grounds for sanctions, including dismissal. *See Ferdick v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir.), *cert. denied*, 113 S.Ct. 321 (1992); Civ. L.R. 1-4.

DISCUSSION

A. LEGAL STANDARD

A complaint should not be dismissed for failure to state a claim under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In reviewing a Rule 12(b)(6) motion, all allegations of material fact in the complaint are taken as true and are construed in the light most favorable to the nonmoving party. *National Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995). This same standard applies to a motion for judgment on the pleadings. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990). In addition, "[o]n a motion to dismiss, . . . a court may take judicial notice of facts outside the pleadings." *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (citation omitted).[9]

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[9] The state defendants request the Court to take judicial notice, pursuant to Federal Rule of Civil Procedure 201(d), of certified documents on deposit in the California State Archives. Since such documents may properly be judicial noticed, *See Rabkin v. Dean*, 856 F. Supp. 543, 546 (N.D. Cal. 1994), and there is no opposition from any other party, this request is granted.

B. OVERVIEW OF THE ADEA

The ADEA prohibits an employer from discriminating against an individual 40 years of age or older *because of* such individual's age. 29 U.S.C. §§ 623(a)(1) and 631(a). An ADEA claim may be based on *disparate treatment* or *disparate impact*. *See Palmer v. United States*, 794 F.2d 534, 536 (9th Cir. 1986). A disparate treatment claim is premised on an "intent to discriminate." *Sakellar v. Lockheed Missle and Space Co.*, 765 F.2d 1453, 1455 (9th Cir. 1985), *cert. denied*, 474 U.S. 1084 (1986). In contrast, to show a disparate impact, the plaintiff must establish that a "facially neutral" employment practice has an "unequal effect" on individuals in the protected age class. *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991).

In this case, plaintiffs are proceeding on a disparate *treatment* theory of liability. To prevail on such a claim, a plaintiff must establish by a preponderance of the evidence that age was a *determining* or *motivating* factor in the employer's employment decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *accord E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1993). "[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Hazen*, 507 U.S. at 609.

C. DISPARATE TREATMENT CLAIM

1. Age Based Discrimination

Plaintiffs contend section 21417 discriminates against older workers because only workers hired under the age of 30 will be able to receive disability retirement benefits equivalent to 50 percent of their final compensation. Plaintiffs, who were all hired at age 40 or older, allege that this disparity is intentional and the result of misperceptions and stereotypes that older workers are more likely to file false claims for disability. *See* First Am. Compl. ¶ 57. As such, plaintiffs assert that section 21417, and defendants' reliance thereon to calculate industrial disability retirement benefits, constitute a violation of the ADEA. The Court disagrees.

Nothing on the face of section 21417 suggests that the employee's age is the controlling factor which determines the amount of a disabled employee's industrial disability retirement allowance. The *method of calculating* this allowance is the *same* under section 21417 for every worker affected by the statute, regardless of his or her age. As discussed above, disability retirement benefits are determined under section 21417 by an employee's *potential years of service,* not by his or her age at retirement. Although the employee's age at the time of hiring affects the amount of the allowance, this is because the employee's age is relevant to his or her potential years of service. The mere fact that the employee's age at the time of hiring is referenced in the determination of an employee's industrial disability retirement allowance does not *ipso facto* suggest – as plaintiffs argue – that section 21417 is intended to affect employees *because of*

their age. *Hazen*, 507 U.S. at 615 ("[b]ecause age and years of service are analytically distinct, an employer can take into account one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily age-based.").

Any calculation of benefits based on an employee's potential years of service (which is projected to an assumed retirement age of 55) must *necessarily* take into account the age at which he or she begins employment. The younger employee is entitled to a larger industrial disability retirement allowance based on the younger employee's greater number of years of potential service to offer relative to an employee who starts working later in life. However, this does not constitute age-based discrimination. *See EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994) ("decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are *not* prohibited."). *cert. denied*, 115 S.Ct. 2577 (1995) (citation omitted).[10]

The Court concludes, that plaintiffs' ADEA disparate treatment claim must fail because under section 21417, the employee's years of service – not age – is the "determinative" factor in calculating the amount of the industrial retirement allowance for a disabled employee.

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[10] At most, the disparity in the industrial disability allowance could be germaine to a disparate impact claim. However, since plaintiffs explicitly state that they are proceeding on a disparate treatment theory of liability, the Court renders no opinion on the viability of such a claim.

2. Legislative History

Plaintiffs next contend that the legislative history underlying the enactment of section 21417 supports the notion that the statute is based on unfounded stereotypes concerning older employees. As discussed, the plain language of section 21417, particularly when read in tandem with the companion provisions applicable to the PERS, convinces the Court that the statute does not intentionally discriminate on the basis of age. *See United States ex rel Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 n.8 (9th Cir. 1996) ("In interpreting a statute, a court should not look to isolated sentences but rather the whole law, and to its object and policy.") (citation omitted). Where the statute's language is clear, it is both the starting and ending point in determining legislative intent. *United States v. Derr*, 968 F.2d 943, 945 (9th Cir. 1992) (citation omitted). Thus, there is no need to examine the legislative history of section 21417 because its purpose and intent are clear from its face.

Notwithstanding the above, even assuming the legislative history is relevant, it is clear that Senate Bill 454, which later became section 21292.6, was enacted to reconcile disability retirement allowances with service retirement allowances, as opposed to facilitating benefits premised on misperceptions respecting older workers. After reviewing the bill, the Legislative Analyst reported that:

> *This bill* limits the industrial disability retirement allowance of patrol, state safety, and local safety members of the Public Employees' Retirement System (PERS) hired after January 1,

> 1980, to the maximum service pension which would be payable to these members at their respective normal retirement age.
>
> * * *
>
> Current PERS experience indicates that industrial disability allowance for safety members, similar to those future members who would be affected by this bill, is higher than the service retirement pension they would receive if they worked until normal retirement age. *Consequently, this bill is expected to reduce future PERS retirement program costs.*

(*See* Analysis of Senate Bill No. 434, dated May 1, 1979, prepared by the Legislative Analyst, State Defs.' Req. for Jud. Notice Ex. D.) (emphasis added).)

The legislative history of Senate Bill 454 establishes that the California Legislature was concerned that a significant percentage of safety workers were receiving *disability* benefits in an amount *greater* than they would have otherwise received had they worked until *retirement*. To avoid this anomaly, the Legislature simply correlated the amount of disability retirement benefits to the employees' years of potential service. (*Id.*) It is evident to the Court that no discriminatory animus against older workers motivated the passage of Senate Bill 454.

Plaintiffs aver that the legislative history of section 21417 "demonstrates that its adoption was primarily based on unfounded stereotypes about older employees." (*See* Pls.' Opp'n to State Defs.' Mot. to Dismiss at 9.) To support this contention, plaintiffs rely heavily on the Enrolled Bill Report issued by the California Highway Patrol ("CHP") in September 1979. (Pingle Decl. Ex. 10.)

In this report, the CHP presented arguments for and against passage of the bill. In the section opposing the bill, CHP states that the bill "discriminates against the older person" because it results in a lower retirement benefit in comparison to a younger worker. (*Id.* at 1-2.)

Plaintiffs overstate the significance of the CHP's Enrolled Bill Report. This report merely represents the views of a state agency, not the entire Legislature. *See Harbor Fumigation, Inc. v. County of San Diego Air Pollution Control Dist.*, 43 Cal. App. 4th 854, 863 (1996) (noting that statements by individual regulatory agencies "cannot be deemed conclusive regarding the legislative intent of the entire Legislature.") In the course of enacting legislation, position papers similar to the CHP's Enrolled Bill Report may be submitted by innumerable federal, state, local, public, private entities, agencies and organizations reflecting their views and identifying their concerns consistent therewith. However, these reports are merely statements of position – oftentimes colored by self-interest – for whatever value they may provide to the Legislature. As such, the CHP report is simply "not sufficient to overcome the *strong indications* of legislative intent in the legislative analysts reports pertaining to section [21417]." *See San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1144 (1988); *Miranda v. National Emergency Servs.*, 35 Cal. App. 4th 894, 903 (1995) (noting that preenactment reports by the Legislative Analyst "have been sanctioned as legitimate sources of legislative intent."). Thus, the Court finds that the legislative history of section 21417 supports the conclusion that it was enacted to harmonize disability retirement benefits with service retirements.

3. EEOC Reports

Finally, plaintiffs attempt to support their ADEA disparate treatment claim by relying on two EEOC reports (attached as Exhibits B and M to the First Amended Complaint) relating to administrative charges of age discrimination by plaintiffs Arnett and Militano. In both cases, the EEOC determined that "there is reasonable cause to believe that Respondents [i.e., defendants herein] discriminated against the Charging Party and other similarly situated persons on account of the age by application of California Government Code Section 21292.6 in violation of the ADEA." (First Am. Compl. Ex. B at 2, Ex. M at 2.) Both decisions reasoned that respondents violated the ADEA because disability retirement benefits are based on the age of the employee at the time of their initial hiring. (*Id.*)

The Court finds that the EEOC reports have little bearing on plaintiffs' disparate treatment claim. Both reports merely discuss section 21417's *impact* on Arnett and Militano. Nothing in the reports suggest that such impact was the result of intentional discriminatory animus against older workers as a class. More importantly, neither report provides any pertinent, substantive analysis concerning age discrimination on the basis of disparate treatment.

Plaintiffs assert that because the EEOC is charged with enforcing the ADEA, 29 U.S.C. § 632, its determinations should be accorded "substantial weight" by the Court. (Pls.' Opp'n to Muni. Defs.' Mot. at 18.) Unfortunately, the authority cited in plaintiffs' motions does not support this conclusion. *See Chevron U.S.A. Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844, *reh'g denied*, 468 U.S. 1227 (1984). *Chevron* holds that when a statute is unclear or ambiguous, the district court is required to defer to an agency's reasonable interpretation of the statute over which it has enforcement authority. *Id.* Such a rule is inapplicable here, as this case does not turn on the interpretation of ambiguous or otherwise unclear provisions of the ADEA or the California Government Code. Rather, the question is whether the PERS' method of determining industrial disability allowances constitutes disparate treatment under the ADEA. In sum, the Court finds these reports do not support plaintiffs' ADEA claim.

E. MANDATORY RETIREMENT AGE CLAIM

In their opposition briefs, plaintiffs allege for the first time that by using age 55 as the benchmark for calculating potential years of service, section 21417 in effect creates a mandatory retirement age of 55. Plaintiffs contend that the imposition of a mandatory retirement age violates the ADEA. This claim is *not* alleged in the First Amended Complaint and therefore is not properly before the Court. Nevertheless, even if such allegations were pleaded, the claim would be meritless.

Plaintiffs evidently misunderstand section 21417 and related statutes. The reference to age 55 in section 21417 refers to the maximum age at which time the statutory multiplier used to calculate regular service retirement ceases to increase for certain categories of safety members. (For example, in the case of patrol officers, the multiplier increases if the employee retires from ages 50

to 55.) Since the statutory multiplier remains fixed after the employee reaches age 55, it is logical that the industrial retirement disability allowance correlate years of service based on that age.

In addition to the above, plaintiffs' argument ignores the practical reality that the older the employee is when hired, the fewer years of service he or she will have to offer. For example, a 40 year old person will generally have more potential years of service remaining than a person 50 year old, regardless of whether the "presumptive" or assumed retirement age is 55 – or 100. The difference will always be constant. The Court therefore finds no merit to plaintiffs' contention that PERS improperly imposes a mandatory retirement age in violation of the ADEA.

CONCLUSION

The Court concludes that plaintiffs have failed to state a claim for disparate treatment under the ADEA. Because any amendment to this claim would be futile, the Court dismisses this claim without leave to amend. However, because plaintiffs may be able to allege facts supporting a disparate impact claim, the Court grants plaintiffs leave to amend to do so. Accordingly.

IT IS HEREBY ORDERED THAT:

1. The state defendants' motion to dismiss and the municipal defendants' motion for judgment on the pleadings are GRANTED. Plaintiffs shall have *twenty days* from the date this order is filed to amend their complaint to allege a disparate impact claim under the ADEA. Failure

to file a Second Amended Complaint within the time period specified by the Court will result in the dismissal of this action, with prejudice.

2. A case management conference in the above-captioned matter shall take place on *December 18, 1996 at 3:00 p.m.;* in Courtroom 3, 1301 Clay Street, 3rd Floor, Oakland, California, 94612. The parties shall file a *joint,* updated case management statement at least *five (5) days* prior to the conference. Failure to timely file a case management conference statement may result in sanctions.

IT IS SO ORDERED.

DATED: November 8, 1996

/s/ S B Armstong
SAUNDRA BROWN ARMSTRONG
United States
District Judge

Supreme Court, U.S.
FILED
DEC 3 1999
CLERK

No. 99-850

In The

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM, *et al.*,

Petitioner,

v.

RONALD ARNETT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MEMORANDUM IN SUPPORT OF PETITION

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QUESTIONS PRESENTED FOR REVIEW

This is a response to the Petition for Writ of Certiorari submitted pursuant to Supreme Court Rule 12.6 by Respondents and Appellants in the proceedings below, the Cities of Fremont, Orange, and West Covina, California, and the County of Riverside, California ("Respondents"). Since Respondents support the position of the Petitioners, they adopt the questions presented for review as stated by the Petitioners.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners before this Court and appellants in the proceedings below are: California Public Employees' Retirement ("CalPERS"); the Board of Administration of CalPERS; the individual board members of the Board of Administration of CalPERS in their official capacity; the State of California; Governor Gray Davis; California Department of Motor Vehicles; California Youth Authority; and the California Department of Corrections ("Petitioners").

Additional Respondents before this Court and appellees in the proceedings below are: Ronald Arnett; Harold Bailey; Jim Bean; Marguerette Howard; Joycelyn Keller; Wayne E. Lord; Diane S. Militano; and Anthony Ryan.

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MEMORANDUM IN SUPPORT OF PETITION

Pursuant to Supreme Court Rule 12.6, Respondents submit this memorandum in support of Petitioners' Petition for Writ of Certiorari filed with this Court on November 15, 1999. As a result, Respondents respectfully pray that Petitioners' Petition be granted and that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 17, 1999, as amended on denial of rehearing and rehearing en banc.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *Arnett v. California Public Employees' Retirement System, et al.*, 179 F.3d 690, *reh'g denied, reh'g en banc denied*, ___ F.3d ___ (9th Cir. 1999). The opinion is repeated at pages 1 through 16 of the Appendix attached hereto. The orders of the District Court are reprinted at pages 17 through pages 43 of the Appendix attached hereto.

JURISDICTION

The Ninth Circuit issued its judgment and opinion on June 2, 1999. Petitioners filed a timely petition for rehearing and rehearing en banc, which the Ninth Circuit denied on August 17, 1999. Petitioners then filed their Petition for Writ of Certiorari on November 15, 1999. This brief is being filed within 20 days of Petitioners filing of their Petition. The jurisdiction of the Court is invoked

under 28 U.S.C. § 1254(1). The district court, the court of first instance, had jurisdiction pursuant to 28 U.S.C. § 1331, federal question jurisdiction.

STATUTES INVOLVED

Plaintiffs challenged the calculation of industrial disability retirement benefits as violative of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (hereinafter "ADEA"). Statutes which are pertinent to the instant proceedings read as follows:

29 U.S.C. § 623(f)(1)

> "It shall not be unlawful for an employer, employment agency, or labor organization – (1) to take any action otherwise prohibited under sections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age[.]"

CAL. GOV'T CODE § 21411 (West Supp. 1999)

> "Upon retirement of a state safety member for industrial disability he or she shall receive a disability retirement allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater."

CAL. GOV'T CODE § 21413 (West Supp. 1999)

> "Upon retirement of a state local member for industrial disability he or she shall receive a

disability retirement allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater."

CAL. GOV'T CODE § 21417 (West Supp. 1999)

"Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980, in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if a patrol, state peace officer/firefighter, state safety, or local safety member, age 65, if service is subject to Section 21076, or age 63, if any other category of member.

This section shall not be applicable to a member who is subject to Section 21430, or a member whose disability results from an injury that is a direct consequence of a violent act perpetrated upon his or her person or occurs during the performance of those portions of his or her duties that are particularly hazardous and dangerous."

STATEMENT OF THE CASE

A. Factual Background.

Plaintiffs in this action are a class of former peace officers, correctional officers and other "safety members"

employed by public agencies throughout California.[1] They were all hired at age 40 or later and they were all retired from their jobs as a result of work-related injuries. Plaintiffs were all entitled to disability benefits under the California Public Employees Retirement System ("CalPERS"). It is the method of computing these disability benefits that is the central issue in this action. Defendants are CalPERS, the State of California, various state employees, and Respondents Cities of Orange, California, West Covina, California, and Fremont, California, as well as the County of Riverside, California. Respondents all contracted for benefits under CalPERS.

B. The CalPERS Plans and the Dispute At Issue.

At issue is the CalPERS method of computing disability benefits. CalPERS provides two types of relevant benefits: service retirement benefits for employees who work until a normal retirement age, and industrial disability retirement benefits for employees who are injured on the job and are forced to retire early with a disability. Pursuant to state law, the mandatory age for service retirement for patrol and local safety members is 60 and for state safety members is 65. CAL. GOV'T CODE §§ 21130, 21131, 21132 (West Supp. 1999). However, if the employee is injured, for purposes of computing benefits that employee is deemed retired at 55 and will receive retirement benefits based on an assumed retirement age of 55,

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[1] The safety member classification includes patrol members, state peace officer/firefighter members, state safety members, and local safety members. CAL. GOV'T CODE § 20371(b) (West Supp. 1999).

63 or 65, depending on the nature of the employee's position. CAL. GOV'T CODE § 21417.

Under the CalPERS system, the level of service retirement benefits received at time of retirement is based on actual years of service and salary at time of retirement. For example, a safety employee who works until normal retirement age receives benefits as follows:

> Monthly service benefits =2% *x* monthly salary *x* actual years of service *x* statutory multiplier[2]

See, e.g., CAL. GOV'T CODE §§ 21362, 21363 (West Supp. 1999). Salaries being equal, the employee with the longer actual years of service will *always* receive more service retirement benefits than the employee with fewer actual years of service. Thus, the employer who started work at a younger age will have more actual years of service and therefore receive more retirement benefits than the employee who began working later in life. The propriety of this plan is not at issue in this action.

What is at issue is the propriety of the CalPERS plan for computing disability retirement benefits. The critical provision is found in California Government Code § 21417, which reads in relevant part:

> Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member . . . shall not exceed the service retirement allowance that would be payable as a result of service . . . if the member's service had continued to age 55, if [the

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[2] All parties agree that the effect of the multiplier is irrelevant to this appeal. It will therefore be omitted from further discussion in this Brief.

> employee is] a patrol, state peace officer/firefighter, state safety, or local safety member . . . [.]

Under this framework, a safety employee injured on the job receives the lesser of (1) 50% of final compensation, or (2) the amount that employee would have received in service retirement benefits had the employee continued to work until the age of 55. Thus, for those disabled employees no longer able to work there is an assumed retirement age of 55. Assuming salaries are equal, as with a service retirement where the employee with more actual years of service will always receive the greater retirement benefits, with a disability retirement, the individual with more potential years of service will always have the greater retirement benefits. That is the heart of this dispute – safety members who began their careers at age 40 or over are claiming that they should get disability retirement benefits equal to employees who began working at age 25. They seek to get in a disability retirement what they could not get in a service retirement – benefits equal to employees who started earlier in life than them.

C. Procedural Background.

On November 8, 1996, District Court Judge Saundra Brown Armstrong ruled that Plaintiffs' First Amended Complaint failed to allege a disparate treatment claim for relief. She granted Plaintiffs leave to amend solely for the purpose of alleging a disparate impact claim. On March 2, 1998, District Court Judge Charles R. Breyer dismissed Plaintiffs' Second Amended Complaint, finding that the CalPERS disability program did not have a disparate impact on older employees. On June 2, 1999, the Ninth

Circuit overturned both prior decisions, ruling that Plaintiffs' Second Amended Complaint states both a disparate impact and a disparate treatment claim. On August 17, 1999, Defendants' Petition for Rehearing was denied, and Petitioners filed their Petition for Writ of Certiorari on November 15, 1999.

REASONS FOR GRANTING THE WRIT

Six years ago in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993), this Court cast serious doubt on whether an age discrimination claim based on disparate impact could be brought under the Age Discrimination in Employment Act ("ADEA"). Since that time every Circuit court which has undertaken an actual evaluation of disparate impact claims in light of *Hazen* has held that such claims are not valid under the ADEA. Although certain Circuits have ignored *Hazen* and blindly held to their pre-*Hazen* rulings, these Circuits are in the minority and their holdings are devoid of compelling legal support. The Ninth Circuit's ruling in this action goes against the clear weight of authority and widens the rift amongst the Circuits as to whether a disparate impact claim is actionable under the ADEA.

The Ninth Circuit's ruling on Plaintiffs' disparate treatment claim also undercuts *Hazen* and creates a split in the Circuits over the propriety of using the concept of "potential" years of service when computing benefits under an early retirement plan. *Hazen* permits employers to base employment decisions on actual years of service and other concepts not directly related to age. Relying in

part on *Hazen*, the Sixth Circuit in *Lyon v. Ohio Education Association and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995) authorized the use of an early retirement plan employing potential years of service as a determinant of benefits. In addition to this split, the Ninth Circuit's decision calls into question the propriety of all early retirement plans that are based on potential years of service.

THIS COURT'S RULING FURTHER EXACERBATES A SPLIT IN THE CIRCUITS

In *Hazen*, the Supreme Court set forth a thorough analysis of the purpose of the ADEA, concluding that disparate impact claims of age discrimination do not represent the problems of discrimination targeted by the ADEA. In *Hazen*, the Court ruled that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA." 507 U.S. at 610, 113 S. Ct. at 1706. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, stated that "[N]othing in the Court's opinion should be read as incorporating in the ADEA the so-called 'disparate impact' theory of Title VII . . . there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." 507 U.S. at 618, 113 S. Ct. at 1710.

The Court explained that Congress promulgated the ADEA out of "its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). Disparate impact claims "involve

employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* Such practices may indeed be undesirable, however, they necessarily do not involve the "inaccurate and denigrating generalizations about age" Congress sought to eradicate.

Every Circuit court that has undertaken an actual evaluation of disparate impact claims in the aftermath of *Hazen* has held that such claims are not valid under the ADEA.[3] District courts in circuits where the higher courts have yet to address the question have made their own determinations, following the Supreme Court's ruling in *Hazen* and disallowing a disparate impact claim under the

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[3] *Mullin v. Raytheon*, 164 F.3d 696, 703 (1st Cir. 1999) ("Congress never intended to make a disparate impact cause of action available under the ADEA . . . we join those courts of appeals which have held that the ADEA does not impose liability under theory of disparate impact"), *cert. denied*, ___ U.S. ___, 120 S. Ct. 44 (1999); *DiBiase v. SmithKline*, 48 F.3d 719, 732-34 (3d Cir. 1995) (holding claims for disparate impact liability not presented in this case and stating, "In the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA."), *cert. denied*, 516 U.S. 916 (1995); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994) (relying on *Hazen* in upholding denial of disparate impact claim under the ADEA), *cert. denied*, 515 U.S. 1142 (1995); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 672 (7th Cir. 1998) ("disparate impact is not, at least in this circuit, a permissible theory of violation of the ADEA"); *Ellis v. United Airlines*, 73 F.3d 999, 1006-10 (10th Cir. 1996) (holding that "disparate impact claims are not cognizable under the ADEA"), *cert. denied*, 547 U.S. 1245 (1996).

ADEA.[4] Even courts which have not yet ruled on the question or that are refusing to do so in light of the Court's disapproving findings in *Hazen* still express their inclination that disparate impact claims are not actionable under the ADEA.[5]

The split in the circuits is generated by this Court's opinion as well as two other circuit court decisions permitting disparate impact under the ADEA. Without exception these courts have either ignored *Hazen* or relied

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[4] *See Evans v. Atwood*, 38 F. Supp. 2d 25 (D.C. Cir. 1999) ("The court concludes that the ADEA does not allow for suits brought on a disparate impact theory"; noting that, "[t]he District of Columbia Circuit has twice looked at the issue of whether the disparate impact theory extends to ADEA claims and in each case the circuit court has ultimately decided not to rule on the issue"); *Fobian v. Storage Technology Corp.*, 959 F. Supp. 742, 743-47 (E.D. Va. 1997) ("Although the Fourth Circuit has recognized disparate impact claims under ADEA in the past, it has not addressed the issue since *Hazen*. . . . The court holds that disparate impact claims are no longer cognizable under the ADEA").

[5] *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996) (DeMoss, J., concurring and dissenting) (agreeing with the Supreme Court's reasoning in *Hazen* distinguishing between Title VII and ADEA and disallowing disparate impact theory under the ADEA); *Lyon v. Ohio Educ. Ass'n Prof'l Staff Union*, 53 F.3d 135, 139-40 (6th Cir. 1995) ("The Court's focus in *Hazen* on Congress's intent to prevent discrimination on inaccurate and damaging stereotypes suggests that incidental discriminatory effects arising from facially age-neutral policies are not repressible[.]"); *Turlington v. Atlanta Gas Light Co .*, 35 F.3d 1428, 1437 n.17 (11th Cir. 1998) ("Neither this court nor the Supreme Court has allowed disparate impact claims under the ADEA").

on pre-*Hazen* decisions without any analysis or evaluation.[6] The Ninth Circuit's opinion merely further divides the Circuits on this issue and provides compelling grounds for the granting of a petition for writ of certiorari pursuant to Supreme Court Rule 10(a).

THIS COURT'S DECISION CONFLICTS WITH PRIOR SUPREME COURT PRECEDENT AND CREATES ANOTHER SPLIT IN THE CIRCUITS

In addition to the split in the circuits on the issue of disparate impact, granting of a petition for writ of certiorari on the disparate treatment issue is also appropriate because the disparate treatment portion of the Ninth Circuit's decision conflicts with *Hazen* and creates a split in the circuits on the potentially far-reaching issue of using potential years of service as a method of computing

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[6] *See Criley v. Delta Air Line, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997). ("Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA . . . in our circuit, we have recognized such an . . . action."), *cert. denied*, 522 U.S. 1028 (1997); *District Council v. New York City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir. 1997) ("Plaintiffs can make a disparate impact claim under the ADEA."); *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745 (8th Cir. 1997) (suggestion for rehearing en banc denied) ("Although the Supreme Court has yet to rule on this legal question, [citation omitted] our circuit continues to recognize the viability of such claims under the ADEA."); *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1470 (8th Cir. 1996); *Houghton v. Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994) ("[I]n pre- and post-*Hazen* decisions, the Eighth Circuit has held that disparate impact claims are cognizable under ADEA.")

retirement benefits. In *Hazen*, the Supreme Court decided that employment decisions based on years of service do not violate the ADEA. However, in that decision the Court did not address the exact scenario present in this case, where employment decisions were based on potential years of service. However, an employee's age plays exactly the same role in determining potential years of service as it does in calculating actual years of service.

Addressing the issue of potential years of service for the first time, the Ninth Circuit erroneously held that the calculation of "potential years of service" under California Government Code § 21417 of the CalPERS is "entirely a function of the employee's age at hire" and thus, discriminatory according to the ADEA. App. at 10. In fact, the CalPERS use of the potential years of service assessment is consistent with the practice of using actual years of service in the computation of traditional retirement benefits and thus, does not discriminate against employees based on their age.

In *Hazen*, the Supreme Court ruled, "that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." 507 U.S. at 613, 113 S. Ct. at 1707-08. Basing employment decisions regarding benefits on employees' years of service, even if the employee is older is not age discrimination. Pursuant to *Hazen*, even if the result is the older employee does not qualify for benefits he would have rightfully acquired this is not age discrimination because the employment decision is based on years of service, not age. Pursuant to *Hazen*, employment decisions based on

years of service are permissible. Likewise, basing determinations of disability retirement benefits on potential years of service does not violate the ADEA. Like the employer in *Hazen*, the employer under CalPERS is *not* penalizing employers because they are older – the benefit computations are based on potential years of service, not age.

In *Lyon v. Ohio Education Association and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995), the Sixth Circuit upheld an early retirement provision of a benefits agreement which utilized potential years of service and a presumed retirement age of 62 to calculate retirement benefits for employees. The provision allowed an employee to elect to retire upon completing 20 years of service or reaching the age of 60 after five years of service, whichever occurred first. 53 F.3d at 136. Comparable to the CalPERS plan, calculating benefits due under this provision required the employer to "impute the necessary years of service to each early retiree based on their present age" and a presumed retirement age of 62. *Id.* at 137.

The result was that a younger employee electing early retirement would have more years "imputed" to him and thus receive higher benefits than an older employee who also chose early retirement and who had the same years of service. *Id.* Identical to the scenario in CalPERS, the younger employee is awarded greater benefits based on the undeniable fact that he has more years to contribute to his employment and his retirement benefits plan.

The *Lyon* court pointed out that the two employees were not "similarly situated" because each began work at a different age. *Id.* at 140. Each has a different, finite number of years they could work and contribute to their benefit plan. It is this difference of workable years, the court emphasized, upon which the awarding of benefits is based. The Sixth Circuit therefore found that this early retirement provision did not award older employees lower benefits because of their age. *Id.* The court recognized that an employee who begins work when older will necessarily have less time to accumulate years of service and therefore will receive a lower benefit upon reaching the presumed retirement age. *Id.* This difference in retirement benefits between employees who start working younger as opposed to those who start working at an older age is not a result of discrimination against older employees. *Id.* Instead, the court held, *it is a fact under any retirement system. Id.* (emphasis added.)

The basis of the plan in *Lyon* is identical to that in CalPERS, yet the Ninth Circuit reached the opposite result. Where in *Lyon* the employer set a presumed retirement age of 62 in order to calculate early retirement benefits, CalPERS sets a presumed retirement age of 55 to calculate disability retirement benefits. In order to figure the benefits due an employee exercising the retirement provision, the plan in *Lyon* required the calculation of the number of years between the employee's actual age at commencement of employment and the presumed age of retirement. Likewise, in CalPERS the plan requires the calculation of the number of years between the employee's actual age at commencement of employment and the presumed age of retirement.

Both plans are based on the premise of traditional retirement systems, that the benefits an employee receives are a function of how many years the employee contributed to their employment and thus to their retirement plan. Both plans use a potential years of service factor as the basis of the calculation of benefits due. *Lyon* holds that any disparity in benefits awarded on the retirement plan "merely reflects the actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age". *Id.* at 140. Nevertheless, the Ninth Circuit held that such a plan violates the ADEA. *Lyon* and to a certain extent *Hazen* hold that the existence of a disparity of benefits alone is insufficient to establish discrimination. *Id.*; 507 U.S. at 613, 113 S. Ct. at 1707-08. As demonstrated in *Lyon*, such disparity is a natural occurrence, not attributable to age-based prejudice. Despite these clear precedents the Ninth Circuit held that CalPERS' nearly identical plan based on potential years of service violates the ADEA, thereby undercutting *Hazen* and *Lyon* and calling into questioning the propriety of similar retirement plans across the country.

CONCLUSION

For the reasons stated above, Respondents respectfully request that Petitioners' Petition for Certiorari be granted.

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DATED: December 3, 1999

APPENDIX

Ronald ARNETT; Harold Bailey; Jim Bean; Marguerette Howard; Joycelyn Keller; Wayne E. Lord; Diane S. Militano, Plaintiffs-Appellants,

and

Anthony Ryan, Plaintiff,

v.

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM (PERS); Harry Bubb; Robert Carlson; Richard "Bud" Carpenter; Thomas Clark; Kathleen Connell; Jerry Cremins; William Crist; Michael Flaherman; Matt Fong; William "Bill" Rosenberg; Kurato Shimada; Charles Valdes, strictly in their official capacity as members of the Board of Administration of PERS; State of California, as administrator of the PERS and by and through each of its agencies; California Youth Authority; California Department of Corrections; City of West Covina; Department of Motor Vehicles; City of Orange; Riverside County; City of Fremont, Defendants-Appellees.

No. 98-15574.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 10, 1999.

Filed June 2, 1999.

As Amended on Denial of Rehearing and Rehearing En Banc Aug. 17, 1999.

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Jennifer S. Goldstein, Equal Employment Opportunity Commission, Washington, D.C., for amicus curiae Equal Employment Opportunity Commission.

Appeal from the United States District Court for the Northern District of California; Charles R. Breyer, District Judge, Presiding. D.C. No. CV-95-03022-CRB.

Before: FERNANDEZ and McKEOWN, Circuit Judges, and WEINER, Senior District Judge.[1]

McKEOWN, Circuit Judge:

This case requires us to address a claim for age discrimination in disability benefits in light of the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

Two individuals are hired as police officers on the same day. One is twenty-five, the other forty-five. A year later, they are injured in the same accident. Under the

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[1] The Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

California Public Employees' Retirement Law, Cal. Gov't Code § 21417, the younger employee receives 50% of final monthly compensation as a disability benefit, but the older employee receives only 20% the difference due solely to their ages at hire. Does a challenge to such a plan state a claim for disparate treatment or disparate impact under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634? We hold that it does, and reverse the district court's grant of motions to dismiss for failure to state a claim and for judgment on the pleadings.

BACKGROUND

Appellants, former police officers, correctional officers and other "safety employees"[2] of the State of California and local agencies (collectively, the "Employees"), brought this class action to challenge calculation of disability benefits under the California Public Employees Retirement System ("PERS," also known as "CalPERS"). The Employees were all hired at age 40 or later and retired from their jobs because of industrial disabilities. Appellees are PERS, the State of California and three local cities and a county which contracted for benefits under PERS (collectively, "PERS"). Employees of state agencies are automatically covered by PERS; local agencies may join PERS to provide benefits for their employees. Cal. Gov't Code §§ 20281, 20300, 20460.

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[2] "Safety employees" is an employment classification that includes, among others, patrol officers, and state peace officers and firefighters. Cal. Gov't Code §§ 20371(b), 20403.

Benefits Under PERS

PERS provides two types of benefits: service retirement benefits for employees who work until a normal retirement age, and industrial disability retirement benefits for employees who are injured on the job and retire with a disability. Under the PERS system, the level of compensation at the time of retirement and actual years of service are the key factors in calculation of service benefits. For example, a safety employee who works until normal retirement age receives benefits calculated as follows:

> monthly service benefits = 2% *x* monthly salary *x* actual years of service *x* statutory multiplier[3]

See, e.g., Cal. Gov't Code §§ 21362, 21363. Thus, an employee who worked twenty-five years before retiring would receive 50% of final monthly compensation as service retirement benefits (2% *x* 25 years), whereas an employee who retired after working 13 years would receive 26% of final compensation (2% *x* 13 years).

Disability retirement benefits are calculated according to a different formula from service benefits. Until 1980, an employee's final compensation was the only variable in computing disability retirement benefits. Under California Government Code section 21292.5,[4] any safety employee injured on the job received 50% of final

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[3] The multiplier ranges from 1.0 to 1.35, depending on the employee's age at retirement, and, for safety employees, does not increase after age 55. Because the parties agree that the effect of the multiplier is irrelevant to this appeal, we omit it from further consideration and discussion.

[4] The statute was recodified as section 21411 in 1995.

compensation as a disability benefit, regardless of age or the number of years of actual service:

> Upon retirement of a state safety member for industrial disability he or she shall receive a disability retirement allowance of 50 percent of his or her final compensation. . . .

In 1980, the California Legislature enacted section 21292.6 (now recodified as section 21417) to provide a limitation on this flat percentage:

> Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member . . . shall not exceed the service retirement allowance that would be payable as a result of service . . . if the member's service had continued to age 55, if [the employee is] a patrol, state peace officer/firefighter, state safety, or local safety member. . . .

Cal. Gov't Code § 21417.

Under the new statutory scheme, a safety employee injured on the job receives the lesser of (1) 50% of final compensation, or (2) the amount that employee would have received in service retirement benefits had the employee continued to work until the age of 55. In order to derive this latter amount, section 21417 imposes a statutory ceiling of 55 – a presumed, but not mandatory retirement age under California law – and calculates an employee's "potential years of service" by subtracting the employee's age at hire from 55. The final compensation and "years of potential service" are the key variables in the calculation. The formula can be expressed as follows:

> monthly disability benefits = 2% x monthly salary x (55 – age at hire)

If the "potential years of service" calculation is less than 50%, the employee will receive only the lower amount as a disability retirement benefit, not the otherwise available 50%.[5]

In mathematical terms, then, section 21417 limits disability retirement benefits to the *lesser* of 50% or 2% *x* (55 – age at hire). The *only* variable that matters in the calculation is the employee's age at hire.

District Court Proceedings

In their First Amended Complaint, the Employees alleged that section 21417 violates the ADEA under a disparate treatment theory because it reduces disability benefits based solely upon workers' ages at hire. The district court disagreed and granted the motions to dismiss and for judgment on the pleadings, holding that the Employees failed to state a disparate treatment claim under *Hazen*. The court granted leave to amend the complaint to allege a disparate impact claim. The district court then dismissed that claim, finding that ADEA regulations authorized the statutory scheme in section 21417,

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[5] For example, if an employee were hired at 38 and later injured on the job, section 21417 would presume 17 "potential years of service" (55-38). Because 2% *x* 17 = 34%, which is less than the statutory default amount of 50%, the injured employee would receive only 34% of final compensation as a disability retirement benefit. An employee hired at 42 and injured on the job would receive only 26%. Successive calculations demonstrate that it is the age at hire, not actual years of service or any other variable, that is determinative of the benefit calculation.

and alternatively, that the benefit differential was justified by "business necessity."

STANDARD OF REVIEW

Because this case comes to us after dismissal pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c), we review the district court's decisions de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir.1998) (dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6)); *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir.) (judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c)), *cert. denied*, ___ U.S. ___, 119 S.Ct. 444, 142 L.Ed.2d 399 (1998).

DISCUSSION

The ADEA prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1). As the Supreme Court has noted, "[t]he Courts of Appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor . . . that is empirically correlated with age." *Hazen*, 507 U.S. at 608, 113 S.Ct. 1701. Here we consider whether "potential years of service" under section 21417 is equivalent to "actual years of service," which, according to *Hazen*, is merely empirically correlated with age and does not violate the ADEA.

I. Disparate Treatment

The parties dispute the significance of *Hazen*. The Employees claim that it is irrelevant. This position underestimates the teaching of *Hazen*. Conversely, PERS argues that *Hazen* is dispositive, because "potential years of service" under section 21417 = is merely a permissible variant of the "actual years of service" standard countenanced by the Supreme Court. *Hazen*, however, does not extend so far.

In *Hazen*, the employer terminated a 62-year old employee who was a few weeks shy of having his pension vest. The Supreme Court held that firing an employee "solely because he has nine-plus years of service and therefore is 'close to vesting' would not constitute discriminatory treatment on the basis of age," regardless of the fact that older employees are more likely to be "close to vesting" than their younger counterparts. *Id.* at 611-12, 113 S.Ct. 1701. When an employer acts on the basis of years of service, a factor that is merely "empirically correlated" with age, *id.* at 608, 113 S.Ct. 1701, a disparate treatment claim must fail:

> When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age. . . .

Id. at 611, 113 S.Ct. 1701 (emphasis in original). The Court went on to explain that age is "analytically distinct" from years of service because a younger employee "may have worked for a particular employer his entire career, while an older worker may have been newly hired." *Id.*

In exempting employment decisions based on actual years of service from liability under the ADEA, however, the Court expressly stated that it was not addressing the "special case" where an employee's pension vests *"as a result of* his age. . . . " *Id.* at 613, 113 S.Ct. 1701 (emphasis added). We are now squarely presented with the "special case" left undecided in *Hazen* – a plan under which employment benefits differ solely "as a result of" age. Whereas the employer in *Hazen* did not violate the ADEA because a decision based on actual years of service permits the employer to "ignore an employee's age," *see id.* at 612, 113 S.Ct. 1701, the calculation of "potential years of service" under section 21417 is *entirely* a function of the employee's age at hire. *See* Cal. Gov't Code § 21417 (calculating disability benefits at 2% *x* (55 – age at hire)).[6]

The net effect of section 21417 can be illustrated as follows:

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[6] The use of 55 as an artificial ceiling further exacerbates the disparity between the benefits provided to younger and older employees. Under PERS' current scheme, a safety employee hired at the age of 45 but injured one year later would receive only 20% of final compensation as a disability retirement benefit [2% *x* (55-45)]. If the ceiling were 65, the mandatory retirement age for state safety members, *see* Cal. Gov't Code § 21132, the employee would instead receive 40% of final compensation as a disability retirement benefit [2% *x* (65-45)]. Of course, an employee hired before the age of 30 would always receive 50% of final compensation as a disability benefit regardless of the ceiling.

Employee's Age at Hire	Disability Benefit Prior to Section 21417	Disability Benefit Under Section 21417
30	50%	50%
35	50%	40%
40	50%	30%
45	50%	20%
50	50%	10%

The question, then, is whether "potential years of service" under section 21417 is analytically equivalent to "actual years of service" under *Hazen*. We hold that it is not. In asserting that "potential years of service" for disability retirement benefits is merely a derivative of the "actual years of service" standard for service retirement benefits, PERS ignores one critical fact: while actual years of service may *tend* to be "empirically correlated" with age, *Hazen*, 507 U.S. at 608, 113 S.Ct. 1701, the calculation of "potential years of service" under section 21417 is a strict function of age. It bears no relationship to length of service, seniority or other factor that might permissibly be "empirically correlated" with age. Were we to credit PERS' argument that section 21417 simply equates disability retirement benefits with service retirement benefits, we would be elevating form over substance. The practical application of section 21417 leaves no doubt that age at hire, not actual years worked or any variant thereof, is the sole basis for lower benefits.

Section 21417 thus represents the photographic negative of *Hazen*, which does not immunize PERS' age-based

benefits plan. *Hazen* teaches that disparate treatment occurs when " 'the employer treats some people less favorably than others because of race, color, religion [or other protected characteristics].' " *Hazen*, 507 U.S. at 609, 113 S.Ct. 1701 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)) (bracketed material in original). This circuit has adopted a "but for" test in analyzing disparate treatment claims under the ADEA. *See E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 646 (9th Cir.1992) ("*Local 350*") ("[A]n employer discriminates 'because of' age [in violation of ADEA] whenever age is a 'but for' cause of discrimination.") (quoting *E.E.O.C. v. Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir.1984)).[7] It is unquestionable that the Employees would have received greater disability retirement benefits but for their older ages at hire. *Id.*; *see also Huff v. UARCO, Inc.*, 122 F.3d 374, 388 (7th Cir.1997) (policy violates ADEA where "age is an express condition of receiving a benefit," and "[b]ut for the age-related restriction," certain older workers would have received a benefit available to other employees). Under *Hazen* and *Local 350*, the Employees stated a disparate treatment claim.

We next address PERS' additional arguments supporting dismissal. PERS contends that the Employees cannot complain about lower disability benefits because

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[7] Because the Sixth Circuit does not follow this circuit's "but for" test of discrimination, PERS' reliance on *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135 (6th Cir. 1995), is misplaced. Lyon is also distinguishable on its facts. *See infra* at n. 8.

they "voluntarily" chose to begin work at a later age. This argument not only ignores the reality of the modern workforce, it conflicts with our rejection of precisely the same argument in *Local 350*. *See Local 350*, 998 F.2d at 646 (rejecting the argument that a policy which discriminated against retirees did not violate the ADEA because those individuals voluntarily decided to retire). PERS further claims that the system presumes that the younger employee, having been in the workforce less time than an older hire, does not have other resources to count on, "unlike an employee who begins work in the public sector later in life." Not only is this wholly speculative, since many employees first enter the workforce later in life, it epitomizes precisely the sort of class-based assumptions that the Supreme Court has repeatedly rejected. *See, e.g., Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (employer violates Title VII's prohibition on discrimination against individuals where employer's retirement contribution scheme assumes that women generally live longer than men).

PERS finally argues that the Employees failed to state a claim because section 21417 was enacted for economic, not discriminatory reasons. Guided by *Hazen*, we note that "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . In a disparate treatment case, liability depends on whether the protected trait . . . actually motivated the employer's decision." 507 U.S. at 609, 610 (internal quotation marks and citations omitted). We decline to make any such determination on appeal

from a 12(b)(6) dismissal. Both sides invoked the legislative history to support their position. For example, the Employees offered a memorandum from the legislative bill file of the Senate Public Employees and Retirement Committee which explained that "[t]he members affected would be those first [hired] at advanced ages," as well as a letter from the California State Employees Association to the sponsor of section 21417 commenting on the perceived unfairness of section 21417: "[A] person who becomes industrially disabled . . . would have the same needs, regardless of age."[8] PERS countered with a Legislative Analyst's report to show that section 21417 was intended to be a cost-saving measure: "[T]his bill is expected to reduce future PERS program retirement costs." Although the Employees have met the threshold pleading requirements for a disparate treatment claim, the necessity of establishing a discriminatory motive highlights the factual nature of the dispute, making the case inappropriate for dismissal at this early stage. *Cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)

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[8] While such documents might support the Employees' position that the Legislature knew of and intended the discriminatory effects, *see Borden's*, 724 F.2d at 1393 ("[T]he discrimination was intentional in the sense that Borden purposefully drafted its . . . policy to have this effect. We need look no further for the intent necessary to support a finding of discrimination under the disparate treatment theory."), we do not decide that issue here. We note, however, that this evidence from the legislative history distinguishes this case from *Lyon*. *See Lyon*, 53 F.3d at 139 (noting that "[t]here was no evidence that either defendant intended . . . to discriminate against older employees").

(determining whether "discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").

II. Disparate Impact

The district court also erred in dismissing the Employees' disparate impact claim in reliance on "applicable age discrimination regulations"[9] and on grounds of "business necessity." A threshold question is whether disparate impact theory survives *Hazen*. In *Local 350*, we explicitly held that disparate impact claims remain cognizable under the ADEA after *Hazen*:

> We perceive no conflict between *Hazen* and our decision in this case. . . . [I]n this circuit a plaintiff may challenge age discrimination under a disparate impact analysis. . . .

998 F.2d at 648 n.2 (as amended on reconsideration). While we recognize the Supreme Court's intimation that a disparate impact claim may not be viable under the ADEA,[10] we are bound, PERS' arguments notwithstanding, by *Local 350's* express reaffirmation of disparate

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[9] The district court did not cite any specific regulations, but the only relevant one is inapplicable here. Although an employer is entitled to distinguish among employees by years of service as long as that distinction is made "without regard to age," *see* 29 U.S.C. § 623(i)(2); *see also Quinones v. City of Evanston*, 58 F.3d 275, 278-79 (7th Cir.1995), that regulation does not defeat the Employees' claim because section 21417 limits benefits on the sole basis of age.

[10] *See Hazen*, 507 U.S. at 610, 113 S.Ct. 1701 ("[W]e have never decided whether a disparate impact theory of liability is

impact theory. *See In re Visness*, 57 F.3d 775, 778 (9th Cir.1995).

Having alleged that the consequences of section 21417 fall more harshly on "those employees hired at age 40 and over," and documenting the impact of the benefit calculations,[11] the Employees adequately stated a disparate impact claim. *See Hazen*, 507 U.S. at 609, 113 S.Ct. 1701; *see also Pfaff v. United States Dept. of Hous. and Urban Dev.*, 88 F.3d 739, 745 (9th Cir.1996) (prima facie case of discrimination under a disparate impact theory requires plaintiff to show " '(1) the occurrence of certain outwardly neutral . . . practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices' ") (bracketed material in original) (quoting *Palmer v. United States*, 794 F.2d 534, 538 (9th

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available under the ADEA. . . . Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."). *See also, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir.1999) (holding that disparate impact claims are not cognizable under the ADEA); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir.1996) (same); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir.1994) (same).

[11] The district court suggested that section 21417 actually adversely impacts younger employees, because younger disabled employees would have received far more than 50% of their salary as disability benefits in absence of the limitation in section 21417. This is incorrect. The default amount for disabled employees is 50%, unless section 21417 applies to *limit* the employee to an amount *lower* than 50%. *See, e.g.*, Cal. Gov't Code §§ 21411, 21417. A younger employee would therefore always receive the default amount of 50%, no more, and would be unaffected by section 21417's limitation.

Cir.1986)); *Local 350*, 998 F.2d at 648 n. 2 (EEOC's challenge to a policy which adversely affected only retirees is cognizable under a disparate impact theory).

It is true that a disparate impact claim fails where a practice can "be justified by business necessity," *see Hazen*, 507 U.S. at 609, 113 S.Ct. 1701, and that PERS defends section 21417 as an effort to save costs. PERS argues that section 21417 was directed at reducing the high cost of providing disability retirement benefits at a rate of 50% of final compensation to employees who, because they began working later in life, would likely never have accumulated enough "actual years of service" to reach that amount in service retirement benefits. On the record before us, whether such a rationale constitutes a sufficient "business necessity" cannot be determined on a motion to dismiss, and the district court erred in dismissing the Employees' disparate impact claim at the pleading stage. *Cf. Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250-51 (9th Cir.1997) (on the record before the court, business necessity defense not appropriate basis for dismissal of disparate impact claim at pleading stage).

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ARNETT, et al.

Plaintiffs,

v.

CA EMPLOYEES' RETIREMENT, et al.,

Defendants.

_____/

No. C95-03022 CRB

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

(Filed Mar. 02, 1998)

Before the Court are defendants' motions to dismiss plaintiffs' disparate impact claim under the Age Discrimination in Employment Act ("ADEA"). Plaintiffs allege that the California Public Employee Retirement System ("PERS") industrial disability retirement allowance improperly discriminates on the basis of age. The Court previously dismissed plaintiffs' disparate treatment claim with prejudice but granted plaintiffs leave to amend the complaint to allege a disparate impact claim under the ADEA. (Hon. Saundra Brown Armstrong). The Court, having read the briefs and declarations submitted by the parties, GRANTS defendants' motions for the reasons articulated by the Court at the hearing on these matters and for the reasons stated herein.

The PERS Disability Retirement Allowance Does Not Violate the ADEA

a. Background

Plaintiffs are a class of California employees subject to the PERS provisions in California Government Code sections 21406 et seq., section 21417, and related sections of the code. The plaintiffs' allegations focus on the cap imposed under the PERS disability retirement allowance. *See* California Government Code § 21417. In essence, that section limits an employee's disability allowance under PERS to the *lesser* of: 50 percent of final compensation or an amount determined by a formula which calculates the service pension an employee would have earned had they worked until retirement age. Various other provisions provide the projected retirement age, which ranges from age 55 to age 65 depending on the class of job which the employee held.[1]

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[1] Section 21362 provides the formula for calculation of the service pension for local safety members: years of service, multiplied by two percent, multiplied by a statutory multiplier determined by age at retirement. The number provided by this formula indicates the percentage of final compensation received by a local safety member upon normal retirement. Section 21413 provides that a local safety member shall receive a disability retirement allowance of 50 percent of their final compensation. Section 21417, however, modifies the disability allowance by capping that amount at the *lesser* of 50% or an amount calculated by the potential years of service from the age the employee was hired, multiplied by two percent, multiplied by the statutory multiplier. For the purposes of this motion, the court will utilize the parameters set forth by the parties in their pleadings; the parties assumed that retirement age was set at 55 and that the statutory multiplier was 1.35. For numerical examples, see footnotes two and three.

For example, the plaintiffs contend that an employee who was hired at age 40 and became injured soon thereafter would receive approximately 40 percent of final compensation as disability retirement. Conversely, an employee hired at age 25 who immediately became injured would receive the full 50 percent allotted by the PERS disability program. Overall, the provisions operate so that as the age at hiring increases, the percentage disability allowance decreases. Plaintiffs contend that these provisions work to "deprive these individual plaintiffs and other members of the class of public safety officers hired after reaching the age of 40 of equal employment opportunities and benefits; and to otherwise adversely affect their status as former employees entitled to industrial disability benefits." (Complaint, ¶ 60).

"A disparate impact claim [under the ADEA] challenges employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1423-24 (9th Cir. 1990) (quotations omitted). A motion to dismiss should not be granted unless it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For purposes of such a motion, the complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. *Everest and Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All reasonable inferences are to be drawn in favor of the plaintiff.

b. Cognizability of a Disparate Impact Claim Under the ADEA

For the purpose of defendants' motions to dismiss, the Court assumes that the plaintiffs may challenge age discrimination under a disparate impact analysis. Although the Ninth Circuit has yet to address this issue in detail, previous decisions have permitted plaintiffs to state such a claim under the statute. *See, e.g., Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1473-74 (9th Cir. 1995); *EEOC v. Local 350*, 998 F.2d 641, 648 n.2 (9th Cir. 1993). Accordingly, the Court assumes, without actually deciding, that a disparate impact claim is cognizable under the ADEA.

c. The Cap on Disability Allowance Does Not Discriminate on the Basis of Age

The plaintiffs' focus their argument on the cap imposed by section 21417. As noted, that section prevents employees hired over the age of 40 from receiving the 50 percent disability allowance provided to employees who start at a younger age. Plaintiffs contend that this bar creates a disparate impact which constitutes impermissible age discrimination.

Initially, an anomaly exists in the plaintiffs' argument that section 21417 discriminates against employees hired over age 40. Although the PERS provisions affect older workers, they also sharply limit the potential disability allowance of those employees who are hired in their twenties. For example, section 21413 sets a 50 percent limit on the disability allowance of an employee hired at

age 25. Absent this provision, that employee would be eligible to receive approximately 80 percent of their final salary.[2] Thus, the 50 percent cap imposed by 21413 and similar sections markedly limits a 25 year old's disability allowance. The Court finds it hard to reconcile this impact on younger employees with the plaintiffs' claim that the PERS disability program impermissibly discriminates against older workers.

Plaintiffs argue however, that section 21417 unfairly limits older employees' disability allowances; barring those hired after 40 from reaching even the 50 percent cap imposed on younger workers.[3] Plaintiffs contend that this disparity evidences the discriminatory impact of the provision because the employee's age at hire is the only variable considered in the cap. The Court finds this argument unpersuasive. The entire PERS disability allowance operates in the same manner as the PERS service pension program, a provision with which the plaintiffs do not take issue. Indeed, both the Seventh and Eighth Circuits have upheld similar pension provisions in the face of age discrimination claims. *See Quinones v. City of Evanston*, 58 F.3d 275, 278-79 (7th Cir. 1995) (holding that the ADEA "preserves employers' right to distinguish among employees by the years of service, even though years of service are related to age"); *Atkins v. Northwest Airlines Inc.*, 967 F.2d 1197, 1201 (8th Cir. 1992).

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[2] This amount is calculated by subtracting 55, the hypothetical retirement age, from 25, the employee's age at hire, multiplied by two percent, multiplied by the statutory multiplier; (30 x 2% x 1.35 = 81%).

[3] E.g., (55-40=15), thus 15 x 2% x 1.35 = 40.5%.

In bringing this claim, plaintiffs ignore the foundation for disability-related provisions. Because the employee has been disabled, employers must base pension calculations on certain factors which could not be know [sic] at the time of the disability, e.g., actual age at retirement. Unless the employer wishes to provide a uniform disability allowance for all employees, such provisions must utilize a hypothetical retirement age. An employee's age at hire must necessarily factor into this equation, whether the retirement age is set at 55 or 95. In all cases using this system, the younger the employee's age when they start work, the greater the pension they will receive upon suffering a disability.

Although the PERS disability provisions do limit the allowance received by older workers and do so based solely and explicitly on the age of those workers, those provisions are entirely permissible under the applicable age discrimination regulations. To hold differently would run counter to the standard, accepted practice in this area. *See Quinones*, 58 F.3d at 278-79. The plaintiffs do not state a basis for a disparate impact claim under the ADEA.

d. The Provisions Address a Legitimate Business Interest

Alternatively, the state's artculated purpose in enacting this provision, reducing future retirement costs, comports with nondiscriminatory goals accepted under the ADEA. Employees may not use a disparate impact claim to attack employment practices which are justified by business necessity. *See Abbott v. Federal Forge, Inc.*, 912

F.2d 867, 875 (6th Cir. 1990). In *Abbott*, the court upheld an employer's moratorium on hiring older workers who demanded credit for past seniority pension benefits. The court held that "[m]inimizing the cost of labor is a legitimate business consideration." *Id.* In doing so, the court stressed that a cost saving measure can still impose a disparate impact if it "systematically and adversely affects older employees or employment applicants." Here, the legislature asserted cost-saving concerns as its basis for enacting the PERS provisions. *See* Analysis of Senate Bill No. 434, dated May 1, 1979, prepared by the Legislative Analyst, State Defs.' Req. for Jud. Notice Ex. A. The plaintiffs do not contend that the provisions have not achieved this purpose. As the PERS provisions do not systematically affect older workers, the Court finds that they were enacted for a legitimate business necessity. Accordingly, plaintiffs are unable to state a claim for disparate impact under the ADEA.

IT IS SO ORDERED.

Dated: 3-2-98

/s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ARNETT, et al.
Plaintiffs,
v.
CA EMPLOYEES' RETIREMENT, et al.
Defendants.
_____/

No. C95-03022 CRB

JUDGMENT

(Filed Mar. 02, 1998)

The Court having granted defendants' Motions to Dismiss by Order dated March 2, 1998, it is hereby ordered that Judgment be entered in favor of defendants against plaintiffs.

IT IS SO ORDERED.

Dated: 3/2/98

/s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RONALD ARNETT, et al. Plaintiffs, vs. CALIFORNIA PUBLIC RETIREMENT SYSTEM (PERS), et al. Defendants.	No. C 95-3022 SBA ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS (Filed Nov. 12, 1996)

Plaintiffs are former state and local public safety employees who entered public employment at or over the age of 40 and eventually received disability benefits under the California Public Retirement System ("PERS"). They allege that the PERS' method of determining disability benefits violates the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, et seq.

The parties are presently before the Court on the state defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and the municipal defendants' motion for judgment on the pleadings pursuant to Rule 12(c).[1] Having read and considered the papers submitted in connection with these matters, and being fully

[1] The "state defendants" are: PERS; California Board of Administration of PERS; Harry Bubb, Robert Carlson, Richard "Bud" Carpenter, Thomas Clark, Kathleen Connell, Jerry Cremins, William Crist, Michael Flaherman, Matt Fong, William "Bill" Rosenberg, Kurato Shimada, David Tarapelle, and

informed, the Court GRANTS defendants' motions and dismisses plaintiffs' ADEA claim for disparate treatment.[2]

BACKGROUND

A. Overview

The PERS is a statewide system which state and local agencies may join to provide retirement benefits and disability retirement benefits for their employees. Cal. Gov't Code § 20460. The PERS' safety member classification includes "patrol members, state peace officer/firefighter members, state safety members, and local safety members." Cal. Gov't Code § 20371(b).

Plaintiffs, Ronald Arnett, Harold Bailey, Jim Bean, Marguerette Howard, Joycelyn Keller, Wayne E. Lord and Diane S. Militano, are former state and local safety employees who were hired at the age of 40 or older. Plaintiff's former employers participate in and are members of the PERS. Each of the plaintiffs in this action suffered job-related injuries and became eligible to

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Charles Valdes, strictly in their official capacity as Members of the Board of Administration of PERS; State of California, as an employer and administrator of the PERS, and by, and through each of its agencies and political subdivisions; Governor Pete Wilson, in his official capacity as Governor of the State of California; California Department of Motor Vehicles; California Youth Authority; and the California Department of Corrections. The "municipal defendants" are: the City of Orange; the City of Fremont; and the City of West Covina; and the County of Riverside.

[2] Pursuant to Civil Local Rule 7-1(b), the Court adjudicates the instant motions without oral argument.

receive an "industrial disability retirement allowance" (or "disability retirement allowance") throughout their disability. Plaintiffs allege that the PERS' method of calculating disability retirement allowances is discriminatory because the older the worker is, at the time of hiring, the smaller his or her disability retirement allowance. To properly analyze plaintiffs' claims, it is first necessary to briefly review the PERS' method of determining service retirement and disability retirement allowances.

B. PERS' Method of Determining Retirement Benefits

1. General

The provisions governing the administration of the PERS are set forth in the California Government Code §§ 20000, et seq. The PERS governs the payment of service retirement benefits and disability retirement benefits for those state and local agencies which have elected to participate in the system. *See* Cal. Gov't Code §§ 21350-21388 (retirement for service); §§ 21400-21432 (disability retirement benefits). *Service* retirement benefits are those benefits payable to an employee who works until and retires at normal retirement age. *Disability* retirement benefits refer generally to those benefits which the employee receives as a result of retiring due to a disability.

2. Service Retirement Benefits

The calculation of normal service retirement benefits for state and local safety members is governed by the

California Government Code. *E.g.*, Cal. Gov't Code § 21362 (patrol members and local safety members); § 21363 (state peace officer/firefighter members). Service retirement benefits (often referred to as the "service retirement allowance") are calculated to equal a certain fraction of the employee's "final compensation." *See City of Sacramento v. Public Employees Retirement Sys.*, 229 Cal. App. 3d 1470, 1478 and n.5 (1991) (citing Cal. Gov't Code §§ 21252.01 and 21252.02, now renumbered §§ 21362 and 21363, respectively).[3] Specifically, retirement allowances are determined by multiplying 2% of an employee's final salary by the employee's years of service (service credit), and then multiplying the product by a statutory multiplier. The statutory multiplier varies depending on the employee's age at retirement. *Id.*[4] For example, under section 21362, the service retirement allowance for a patrol or local safety member who has 18.5 years of service who retires at age 55 is calculated as follows: 2

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[3] Effective January 1, 1996, the provisions governing the PERS were recodified and renumbered. California Government Code §§ 21294 (industrial disability for local safety member), 21292.5 (industrial disability for state safety member) and 21292.6 (amount of industrial disability for membership commencing after January 1, 1980) were repealed in 1995 and replaced with California Government Code §§ 21411, 21413 and 21417, respectively. All statutory references are to the California Government Code unless otherwise stated.

[4] Under section 21362, the statutory multiplier for patrol and local safety members ranges from 1.00 (retirement at age 50) to 1.35 (retirement at age 50 and over). Cal. Gov't Code § 21362. Under section 21363, the statutory multiplier for state peace officer/firefighter and certain local safety members ranges from 1.00 (retirement at age 50) to 1.25 (retirement at age 55 and over). *Id.* § 21363.

percent x final salary x *18.5* (years of service) x *1.35* (statutory multiplier = a service retirement allowance of *50 percent of his final compensation.*[5]

3. Disability Retirement Benefits

An employee who falls within the safety member classification who retires on disability would be entitled to an industrial disability allowance equal to 50 percent of his or her final compensation. Cal. Gov't Code §§ 21411; 21413. Section 21411 provides:

> Upon retirement of a state safety member for industrial disability he or she shall receive a disability retirement allowance of *50 percent of his or her final compensation* plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater.

(Emphasis added); *see also* Cal. Gov't Code § 21413 (same language as section 21411 except replaces "state safety member" with "local safety member"). Thus, it is possible that an employee could receive a *greater* amount of pension benefits by retiring on the basis of disability than if he or she had worked until normal retirement age.

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[5] As noted, the statutory multiplier varies depending on the employee's age at retirement. Thus, in the above example, if the employee retired at age 50 instead of fifty-five, the statutory multiplier would be *1.00* instead of *1.35*. *See* Cal. Gov't Code § 21362. The specific multiplier also varies depending on the employee's classification. *Compare id. with id.* § 21363.

To address this disparity, the California Legislature modified the statutory provisions governing payment of industrial retirement allowances by enacting California Government Code § 21292.6, now renumbered as section 21417. Section 21417 states, in relevant part:

> Notwithstanding any other provision of this part, *the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980,* in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, *shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if a patrol, state peace officer/firefighter, state safety,* or local safety member, age 65, if service is subject to section 21076, or age 63, if any other category of member.

(Emphasis added). This statute became effective on January 1, 1980.

In essence, section 21417 limits the industrial disability allowance to the *lesser* of either (1) 50 percent of the employee's final compensation or (2) the employee's service retirement allowance projected to service retirement age of 55. With regard to the latter alternative, the industrial disability allowance is calculated by (1) subtracting the age of the employee at the time of hiring from the age of 55, and (2) multiplying the difference by a statutory multiplier to be determined by the employee's job

category.[6] The net effect of section 21417 is that only employees hired at the age of 30 and under will be able to qualify for disability retirement benefits equal to 50 percent of their final compensation. In contrast, employees hired over the age of 30 are effectively foreclosed from obtaining the full industrial disability retirement allowance (i.e., 50 percent of a member's final compensation).

C. Procedural

Plaintiffs commenced the instant proposed class action lawsuit on August 28, 1995. On March 4, 1996, plaintiffs filed their First Amended Complaint alleging a claim for disparate treatment under the ADEA.

Plaintiffs allege that the PERS' method of calculating disability retirement allowances discriminates against those employees who begin employment after the age of 30. According to plaintiffs, the net effect of section 21417 is that workers hired over the age of 30 will never be able to realize the statutory 50 percent maximum retirement allowance.[7] Plaintiffs allege that section 21417 was enacted because of misconceptions and stereotypes regarding older workers, as evidenced by the face of the statute, the legislative history underlying its enactment,

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[6] For example, based on the above formula, plaintiff Militano's IDA is calculated as follows: (55 years - 54.5 years of age at time of entry) x 2% = 27%.

[7] As will be set forth below, the ADEA protects individuals over the age of *40*. All plaintiffs allege that they were hired at the age of 40 and above.

and two separate findings by the Equal Employment Opportunity Commission in favor of plaintiffs Arnett and Militano. The First Amended Complaint seeks injunctive relief, back pay and damages.

The state defendants have filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Defendants City of West Covina, City of Orange and City of Fremont have filed a motion for judgment on the pleadings under Rule 12(c). Defendant County of Riverside has filed a joinder in the motion for judgment on the pleadings. The crux of these motions is that section 21417 is not discriminatory, because *years of service*, not age, is the determinative factor in calculating disability retirement allowances. Plaintiffs have filed oppositions to these motions and defendants have filed replies thereto.[8]

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[8] Plaintiffs have violated several Local Rules of this Court. First, plaintiffs' opposition briefs exceed ten pages in length, but do not contain a table of contents or table of authorities as required by Civil Local Rule 7-4(a)(2). Second, plaintiffs filed a lengthy letter brief purporting to respond to defendants' reply briefs. Surreply briefs are not authorized under the Civil Local Rules and plaintiffs failed to otherwise seek leave of Court before filing their letter. Said papers are stricken and will not be considered by the Court. Finally, plaintiffs attach a chart entitled "Amount of IDR Pension" as Exhibit "A" to their opposition to the state defendants' motion to dismiss. The state defendants object to this exhibit on the ground that it is not properly authenticated. Civil Local Rule 7-5(a) requires that "evidentiary matters must be appropriately authenticated by an affidavit or declaration." Since the exhibit fails to comport with this rule, the Court sustains the state defendants' objection. Plaintiffs are warned that further violations of the Local Rules or any order of this Court will be deemed grounds for sanctions, including dismissal. *See Ferdick v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir.), *cert. denied*, 113 S.Ct. 321 (1992); Civ. L.R. 1-4.

DISCUSSION

A. LEGAL STANDARD

A complaint should not be dismissed for failure to state a claim under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In reviewing a Rule 12(b)(6) motion, all allegations of material fact in the complaint are taken as true and are construed in the light most favorable to the nonmoving party. *National Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995). This same standard applies to a motion for judgment on the pleadings. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990). In addition, "[o]n a motion to dismiss, . . . a court may take judicial notice of facts outside the pleadings." *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (citation omitted).[9]

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[9] The state defendants request the Court to take judicial notice, pursuant to Federal Rule of Civil Procedure 201(d), of certified documents on deposit in the California State Archives. Since such documents may properly be judicial noticed, *See Rabkin v. Dean*, 856 F. Supp. 543, 546 (N.D. Cal. 1994), and there is no opposition from any other party, this request is granted.

B. OVERVIEW OF THE ADEA

The ADEA prohibits an employer from discriminating against an individual 40 years of age or older *because of* such individual's age. 29 U.S.C. §§ 623(a)(1) and 631(a). An ADEA claim may be based on *disparate treatment* or *disparate impact*. *See Palmer v. United States*, 794 F.2d 534, 536 (9th Cir. 1986). A disparate treatment claim is premised on an "intent to discriminate." *Sakellar v. Lockheed Missle and Space Co.*, 765 F.2d 1453, 1455 (9th Cir. 1985), *cert. denied*, 474 U.S. 1084 (1986). In contrast, to show a disparate impact, the plaintiff must establish that a "facially neutral" employment practice has an "unequal effect" on individuals in the protected age class. *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991).

In this case, plaintiffs are proceeding on a disparate *treatment* theory of liability. To prevail on such a claim, a plaintiff must establish by a preponderance of the evidence that age was a *determining* or *motivating* factor in the employer's employment decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *accord E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1993). "[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Hazen*, 507 U.S. at 609.

C. DISPARATE TREATMENT CLAIM

1. Age Based Discrimination

Plaintiffs contend section 21417 discriminates against older workers because only workers hired under the age of 30 will be able to receive disability retirement benefits equivalent to 50 percent of their final compensation. Plaintiffs, who were all hired at age 40 or older, allege that this disparity is intentional and the result of misperceptions and stereotypes that older workers are more likely to file false claims for disability. *See* First Am. Compl. ¶ 57. As such, plaintiffs assert that section 21417, and defendants' reliance thereon to calculate industrial disability retirement benefits, constitute a violation of the ADEA. The Court disagrees.

Nothing on the face of section 21417 suggests that the employee's age is the controlling factor which determines the amount of a disabled employee's industrial disability retirement allowance. The *method of calculating* this allowance is the *same* under section 21417 for every worker affected by the statute, regardless of his or her age. As discussed above, disability retirement benefits are determined under section 21417 by an employee's *potential years of service,* not by his or her age at retirement. Although the employee's age at the time of hiring affects the amount of the allowance, this is because the employee's age is relevant to his or her potential years of service. The mere fact that the employee's age at the time of hiring is referenced in the determination of an employee's industrial disability retirement allowance does not *ipso facto* suggest – as plaintiffs argue – that section 21417 is intended to affect employees *because of*

their age. *Hazen*, 507 U.S. at 615 ("[b]ecause age and years of service are analytically distinct, an employer can take into account one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily age-based.").

Any calculation of benefits based on an employee's potential years of service (which is projected to an assumed retirement age of 55) must *necessarily* take into account the age at which he or she begins employment. The younger employee is entitled to a larger industrial disability retirement allowance based on the younger employee's greater number of years of potential service to offer relative to an employee who starts working later in life. However, this does not constitute age-based discrimination. *See EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994) ("decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are *not* prohibited."). *cert. denied*, 115 S.Ct. 2577 (1995) (citation omitted).[10]

The Court concludes, that plaintiffs' ADEA disparate treatment claim must fail because under section 21417, the employee's years of service – not age – is the "determinative" factor in calculating the amount of the industrial retirement allowance for a disabled employee.

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[10] At most, the disparity in the industrial disability allowance could be germaine to a disparate impact claim. However, since plaintiffs explicitly state that they are proceeding on a disparate treatment theory of liability, the Court renders no opinion on the viability of such a claim.

2. Legislative History

Plaintiffs next contend that the legislative history underlying the enactment of section 21417 supports the notion that the statute is based on unfounded stereotypes concerning older employees. As discussed, the plain language of section 21417, particularly when read in tandem with the companion provisions applicable to the PERS, convinces the Court that the statute does not intentionally discriminate on the basis of age. *See United States ex rel Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 n.8 (9th Cir. 1996) ("In interpreting a statute, a court should not look to isolated sentences but rather the whole law, and to its object and policy.") (citation omitted). Where the statute's language is clear, it is both the starting and ending point in determining legislative intent. *United States v. Derr*, 968 F.2d 943, 945 (9th Cir. 1992) (citation omitted). Thus, there is no need to examine the legislative history of section 21417 because its purpose and intent are clear from its face.

Notwithstanding the above, even assuming the legislative history is relevant, it is clear that Senate Bill 454, which later became section 21292.6, was enacted to reconcile disability retirement allowances with service retirement allowances, as opposed to facilitating benefits premised on misperceptions respecting older workers. After reviewing the bill, the Legislative Analyst reported that:

> *This bill* limits the industrial disability retirement allowance of patrol, state safety, and local safety members of the Public Employees' Retirement System (PERS) hired after January 1,

> 1980, to the maximum service pension which would be payable to these members at their respective normal retirement age.
>
> * * *
>
> Current PERS experience indicates that industrial disability allowance for safety members, similar to those future members who would be affected by this bill, is higher than the service retirement pension they would receive if they worked until normal retirement age. *Consequently, this bill is expected to reduce future PERS retirement program costs.*

(*See* Analysis of Senate Bill No. 434, dated May 1, 1979, prepared by the Legislative Analyst, State Defs.' Req. for Jud. Notice Ex. D.) (emphasis added).)

The legislative history of Senate Bill 454 establishes that the California Legislature was concerned that a significant percentage of safety workers were receiving *disability* benefits in an amount *greater* than they would have otherwise received had they worked until *retirement*. To avoid this anomaly, the Legislature simply correlated the amount of disability retirement benefits to the employees' years of potential service. (*Id.*) It is evident to the Court that no discriminatory animus against older workers motivated the passage of Senate Bill 454.

Plaintiffs aver that the legislative history of section 21417 "demonstrates that its adoption was primarily based on unfounded stereotypes about older employees." (*See* Pls.' Opp'n to State Defs.' Mot. to Dismiss at 9.) To support this contention, plaintiffs rely heavily on the Enrolled Bill Report issued by the California Highway Patrol ("CHP") in September 1979. (Pingle Decl. Ex. 10.)

In this report, the CHP presented arguments for and against passage of the bill. In the section opposing the bill, CHP states that the bill "discriminates against the older person" because it results in a lower retirement benefit in comparison to a younger worker. (*Id.* at 1-2.)

Plaintiffs overstate the significance of the CHP's Enrolled Bill Report. This report merely represents the views of a state agency, not the entire Legislature. *See Harbor Fumigation, Inc. v. County of San Diego Air Pollution Control Dist.*, 43 Cal. App. 4th 854, 863 (1996) (noting that statements by individual regulatory agencies "cannot be deemed conclusive regarding the legislative intent of the entire Legislature.") In the course of enacting legislation, position papers similar to the CHP's Enrolled Bill Report may be submitted by innumerable federal, state, local, public, private entities, agencies and organizations reflecting their views and identifying their concerns consistent therewith. However, these reports are merely statements of position – oftentimes colored by self-interest – for whatever value they may provide to the Legislature. As such, the CHP report is simply "not sufficient to overcome the *strong indications* of legislative intent in the legislative analysts reports pertaining to section [21417]." *See San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1144 (1988); *Miranda v. National Emergency Servs.*, 35 Cal. App. 4th 894, 903 (1995) (noting that preenactment reports by the Legislative Analyst "have been sanctioned as legitimate sources of legislative intent."). Thus, the Court finds that the legislative history of section 21417 supports the conclusion that it was enacted to harmonize disability retirement benefits with service retirements.

3. EEOC Reports

Finally, plaintiffs attempt to support their ADEA disparate treatment claim by relying on two EEOC reports (attached as Exhibits B and M to the First Amended Complaint) relating to administrative charges of age discrimination by plaintiffs Arnett and Militano. In both cases, the EEOC determined that "there is reasonable cause to believe that Respondents [i.e., defendants herein] discriminated against the Charging Party and other similarly situated persons on account of the age by application of California Government Code Section 21292.6 in violation of the ADEA." (First Am. Compl. Ex. B at 2, Ex. M at 2.) Both decisions reasoned that respondents violated the ADEA because disability retirement benefits are based on the age of the employee at the time of their initial hiring. (*Id.*)

The Court finds that the EEOC reports have little bearing on plaintiffs' disparate treatment claim. Both reports merely discuss section 21417's *impact* on Arnett and Militano. Nothing in the reports suggest that such impact was the result of intentional discriminatory animus against older workers as a class. More importantly, neither report provides any pertinent, substantive analysis concerning age discrimination on the basis of disparate treatment.

Plaintiffs assert that because the EEOC is charged with enforcing the ADEA, 29 U.S.C. § 632, its determinations should be accorded "substantial weight" by the Court. (Pls.' Opp'n to Muni. Defs.' Mot. at 18.) Unfortunately, the authority cited in plaintiffs' motions does not support this conclusion. *See Chevron U.S.A. Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844, *reh'g denied*, 468 U.S. 1227 (1984). *Chevron* holds that when a statute is unclear or ambiguous, the district court is required to defer to an agency's reasonable interpretation of the statute over which it has enforcement authority. *Id.* Such a rule is inapplicable here, as this case does not turn on the interpretation of ambiguous or otherwise unclear provisions of the ADEA or the California Government Code. Rather, the question is whether the PERS' method of determining industrial disability allowances constitutes disparate treatment under the ADEA. In sum, the Court finds these reports do not support plaintiffs' ADEA claim.

E. MANDATORY RETIREMENT AGE CLAIM

In their opposition briefs, plaintiffs allege for the first time that by using age 55 as the benchmark for calculating potential years of service, section 21417 in effect creates a mandatory retirement age of 55. Plaintiffs contend that the imposition of a mandatory retirement age violates the ADEA. This claim is *not* alleged in the First Amended Complaint and therefore is not properly before the Court. Nevertheless, even if such allegations were pleaded, the claim would be meritless.

Plaintiffs evidently misunderstand section 21417 and related statutes. The reference to age 55 in section 21417 refers to the maximum age at which time the statutory multiplier used to calculate regular service retirement ceases to increase for certain categories of safety members. (For example, in the case of patrol officers, the multiplier increases if the employee retires from ages 50

to 55.) Since the statutory multiplier remains fixed after the employee reaches age 55, it is logical that the industrial retirement disability allowance correlate years of service based on that age.

In addition to the above, plaintiffs' argument ignores the practical reality that the older the employee is when hired, the fewer years of service he or she will have to offer. For example, a 40 year old person will generally have more potential years of service remaining than a person 50 year old, regardless of whether the "presumptive" or assumed retirement age is 55 – or 100. The difference will always be constant. The Court therefore finds no merit to plaintiffs' contention that PERS improperly imposes a mandatory retirement age in violation of the ADEA.

CONCLUSION

The Court concludes that plaintiffs have failed to state a claim for disparate treatment under the ADEA. Because any amendment to this claim would be futile, the Court dismisses this claim without leave to amend. However, because plaintiffs may be able to allege facts supporting a disparate impact claim, the Court grants plaintiffs leave to amend to do so. Accordingly.

IT IS HEREBY ORDERED THAT:

1. The state defendants' motion to dismiss and the municipal defendants' motion for judgment on the pleadings are GRANTED. Plaintiffs shall have *twenty days* from the date this order is filed to amend their complaint to allege a disparate impact claim under the ADEA. Failure

to file a Second Amended Complaint within the time period specified by the Court will result in the dismissal of this action, with prejudice.

2. A case management conference in the above-captioned matter shall take place on *December 18, 1996 at 3:00 p.m.*, in Courtroom 3, 1301 Clay Street, 3rd Floor, Oakland, California, 94612. The parties shall file a *joint*, updated case management statement at least *five (5) days* prior to the conference. Failure to timely file a case management conference statement may result in sanctions.

IT IS SO ORDERED.

DATED: November 8, 1996

/s/ S B Armstong
SAUNDRA BROWN ARMSTRONG
United States
District Judge

(3)

No. 99-850

FILED

DEC 17 1999

CLERK

In The

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,

Petitioners,

v.

RONALD ARNETT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF IN OPPOSITION

Respondents respectfully pray that this Court deny the petition for writ of certiorari filed by the California Public Employees' Retirement System and other State defendants.

STATUTES INVOLVED

Petitioners omitted relevant sections of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA").

Section 29 U.S.C. § 623(a)(1) of the ADEA provides:

"It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

Section 29 U.S.C. § 630(1) of the ADEA provides:

"The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan."

STATEMENT OF THE CASE

Plaintiffs are disabled police officers, firefighters, correctional officers and other "safety employees" of the State of California and local agencies, who are covered by

the California Public Employees' Retirement System (PERS). Plaintiffs and members of their class were hired at age 40 or above. After suffering on-the-job disabilities, they retired and began receiving industrial disability retirement benefits computed as a percentage of their final compensation.

If plaintiffs had not become disabled and had served until they voluntarily retired, they would have received PERS service retirement benefits based on a formula in which the key variable is the employee's actual years of service.[1] That formula is expressed: monthly service benefits = 2% x final monthly pay x actual years of service. For example, an employee who works 25 years before retiring receives 50% of final monthly compensation as service retirement benefits (2% x 25 years), whereas an employee who works 13 years before retiring receives 26% of final compensation (2% x 13 years). Pet. App. 4.

PERS disability retirement benefits are based on a different formula. Until 1980, any safety employee injured on the job received a flat 50 percent of final compensation as a disability benefit, regardless of age or years of actual service. Cal. Gov. Code §§ 21407, 21411, 21413. Effective in 1980, the California Legislature enacted Government Code section 21417 to limit this flat percentage. Under section 21417's statutory formula, a safety employee disabled on the job receives the *lesser* of

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[1] There is another variable, a statutory multiplier which ranges from 1.0 to 1.35 depending on the employee's age at retirement. Because the parties agree that the effect of the multiplier is irrelevant to this appeal, it is not discussed further. *See* Pet. App. 4, n. 3.

(1) 50% of final compensation or (2) the amount the employee would have received as service retirement benefits had the employee worked until age 55. The formula to derive this latter amount is expressed: monthly disability benefits = 2% x final monthly pay x (55 – age at hire).[2] Pet. App. 5.

A chart in the Ninth Circuit opinion demonstrates how section 21417 works. Pet. App. 10. Assume a 30-year-old, a 35-year-old, a 40-year-old, a 45-year-old, and a 50-year-old are hired on the same day in the same job classification and are later disabled on the same day. The employee hired at 30 would receive 50 percent of final pay. (2% x [55-30]) The employee hired at 35 would get 40 percent of final pay. (2% x [55-35]). The employee hired at 40 would get 30 percent of final pay. (2% x [55-40]). The employee hired at 45 would receive 20 percent of final pay. (2% x [55-45]). The employee hired at 50 would receive 10 percent of final pay. (2% x [55-50]). As the Ninth Circuit stated, "The *only* variable that matters in the calculation is the employee's age at hire." Pet. App. 6, italics in original.

In their first amended complaint, plaintiffs alleged disparate treatment, asserting that "by operation of the express terms" of section 21417, their retirement benefits

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[2] Age 55 is *not* a mandatory retirement age for PERS safety employees. Compulsory retirement for state safety employees is 65 and for local safety employees is 60, but only if the local agency finds age is a bona fide occupational qualification. (Cal. Gov. Code §§ 21132, 21131) The Ninth Circuit found that section 21417's use of age 55 as an "artificial ceiling" further exacerbates the statute's age-based discrimination. Pet. App. 9, n. 6.

were lower than those of younger-hired employees. The district court, per Judge Saundra Brown Armstrong, noted that the "net effect of section 21417 is that only employees hired at the age of 30 and under will be able to qualify for disability retirement benefits equal to 50 percent of their final compensation" while "employees hired over the age of 30 are effectively foreclosed from obtaining the full industrial disability retirement allowance. . . . " Pet. App. 31. Nonetheless, the court dismissed the disparate treatment claim but invited plaintiffs to amend to state a disparate impact claim. Pet. App. 25.

Plaintiffs filed a second amended complaint alleging disparate impact. The district court, per Judge Charles R. Breyer, recognized that the "PERS disability provisions do limit the allowance received by older workers and do so based solely and explicitly on the age of those workers." Pet. App. 22. However, the court held that the provisions "are entirely permissible under the applicable age discrimination regulations" *(id.)*, dismissed the complaint, and entered judgment for defendants.

The Ninth Circuit reversed and remanded. *Arnett v. California Public Employees' Retirement System*, 179 F.3d 690 (9th Cir. 1999). The court held that plaintiffs had stated a disparate treatment claim because the calculation of retirement disability benefits under section 21417 is "*entirely* a function of the employee's age at hire." Pet. App. 9, italics in original. The court held that plaintiffs had stated a disparate impact claim by alleging and documenting that the consequences of section 21417 fall more

harshly on those employees hired at age 40 and over. Pet. App. 15.

REASONS WHY THE WRIT SHOULD BE DENIED

I. BECAUSE THIS CASE IS PRIMARILY A DISPARATE TREATMENT CASE, IT WOULD BE A POOR VEHICLE TO CONSIDER THE VIABILITY OF DISPARATE IMPACT CLAIMS UNDER THE ADEA.

Arnett is the wrong case to decide whether disparate impact theory survives under the ADEA because this case began and remains in its essence a disparate treatment case.

In their complaint and first amended complaint, plaintiffs alleged disparate treatment, asserting that "by operation of its express terms," section 21417 discriminates against those PERS members 40 and over when hired "since it limits their disability benefits without limiting the benefits of younger workers on an equal basis." District Judge Breyer, who later dismissed the disparate impact claim, agreed that section 21417 was explicitly age-based: "[T]he PERS disability provisions do limit the allowance received by older workers and do so based *solely and explicitly on the age of those workers. . . .* " Pet. App. 22, italics added.

Plaintiffs added the disparate impact allegations only after District Judge Armstrong, in dismissing the disparate treatment claim, expressly invited plaintiffs to amend, stating, "At most, the disparity in the industrial disability allowance could be germaine to a disparate impact claim." Pet. App. 36, n. 10; *id.* 42. The inclusion of

a disparate impact claim was intended to ensure that, regardless of pleading labels, the validity of section 21417's provision of lower benefits to older-hired workers would be squarely decided.

Because this case is so atypical of disparate impact claims, however, it would be a poor vehicle to decide whether disparate impact allegations are cognizable under the ADEA. Generally, disparate impact cases challenge facially neutral policies that fall more harshly on one group than another. There is usually only a rough empirical correlation between the protected characteristic, such as age, and the challenged practice. Consequently, disparate impact cases are proven by statistical analysis showing a disproportionate effect on a protected group. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

The decisions in which three circuits have held that disparate impact theory is not available under the ADEA demonstrate typical disparate impact cases. In *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996), the plaintiffs, who were refused jobs as flight attendants, alleged United's weight requirements had a disparate impact on older people, who tend to be heavier. In *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995), the EEOC claimed the Parker School excluded a disproportionate percentage of older applicants from consideration by setting a low maximum salary for a vacant position. And in *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.), *cert. denied*, 120 S.Ct. 44 (1999), the plaintiff argued Raytheon's consolidation of operations and restructuring of its work force had a disparate impact on the salaries and positions of older employees, who were higher paid.

This case is entirely different. Section 21417 specifically mandates use of an employee's age at hire in computing his or her disability retirement benefits. Moreover, under section 21417 there is a precise and continuous *reverse* correlation between an employee's age at hire and his or her disability payment. The older the employee is when hired, the smaller the disability retirement benefit he or she will get. *Every* employee hired at age 40 and above *necessarily* receives a lower disability retirement benefit than those hired at below 40. See Pet. App. 10. No statistical analysis will be necessary to prove the disparate impact allegations in the instant matter. Because of the uniqueness of this case, any decision about the viability of a disparate impact claim here would not have wider applicability.

The Court should deny certiorari on the disparate impact issue for the additional reason that a decision on that point would have no practical effect in this case. The California Legislature has just amended the California Fair Employment and Housing Act (FEHA) to confirm that disparate impact claims based on age are recognized under the California statute. The new law, Government Code section 12941.1, becomes effective January 1, 2000. Thus, plaintiffs can allege disparate impact as a pendent claim under the FEHA even if that doctrine is not available under the ADEA.

II. THE NINTH CIRCUIT'S RULING THAT SECTION 21417'S CALCULATION OF BENEFITS IS A "STRICT FUNCTION OF AGE" DOES NOT CONFLICT WITH *HAZEN PAPER* OR CREATE A SPLIT IN THE CIRCUITS.

In *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), this Court held that the employer did not violate the ADEA by firing an employee to prevent vesting of his pension. Since the worker's pension status was determined by his years of service, not his age, the employer had acted on the basis of a factor that was "analytically distinct" from age, the Court reasoned.

> "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.' " *Hazen Paper*, 507 U.S. at 611.

However, this Court specifically noted that ADEA liability might exist in the "special case" where an employee's pension vests *as a result of his age*, not his years of service. *Id.* at 612-613, italics added.

The Ninth Circuit found that this case presented the "special case" left undecided in *Hazen Paper* – a plan under which employment benefits differ solely "as a result of age." Pet. App. 9. While the *Hazen Paper* employer did not violate the ADEA because its decision was based on actual years of service, the calculation of benefits under section 21417 is "*entirely* a function of the employee's age at hire," the Ninth Circuit concluded. *Id.*, italics in original. The Ninth Circuit's chart, showing the steady decline in disability benefits as an employee's age

of hire rises, proves the accuracy of the court's holding. Pet. App. 10.

PERS had argued below that section 21417 calculated benefits based on "potential years of service" – the difference between age at hire and 55 – and that "potential years of service" was analytically equivalent to "actual years of service" under *Hazen Paper.*

The Ninth Circuit rejected that semantic and inaccurate contention, stating that the calculation of "potential years of service" under section 21417 is a "strict function of age" which bears "no relationship to length of service, seniority or other factors that might permissibly be 'empirically correlated' with age." Pet. App. 10. The practical application of section 21417 "leaves no doubt," the court declared, that "age at hire, not actual years worked or any variant thereof, is the sole basis for lower benefits." *Id.* And, because 55 is not a mandatory retirement age, it acts as an "artificial ceiling" which exacerbates the disparity in benefits provided to younger and older employees. *Id.* at 9, n. 6.

Thus, *Arnett* is entirely consistent with *Hazen Paper.* Both decisions teach that age-based practices violate the ADEA but those predicated on *actual* years of service do not.

This case does not conflict with the Sixth Circuit's decision in *Lyon v. Ohio Educ. Ass'n & Professional Staff,* 55 F.3d 135 (6th Cir. 1995). In *Lyon,* the plaintiffs contended that an early retirement provision violated the ADEA because younger retirees received a larger pension than

older workers who retired with the same length of service. The challenged pension provision imputed the necessary years of service to allow each potential retiree to reach age 62. If two employees each had 21 years of service but one was 52 and the other 56, the plan imputed ten years' extra service to the 52-year-old and six years' extra service to the 56-year-old.

The *Lyon* court affirmed the grant of summary judgment to the defendants for two reasons. First, Congress explicitly intended to permit such provisions in early retirement plans; the "very purpose of offering an early retirement *incentive* plan is to 'buy out' expensive workers." *Id.* at 139-140 and n. 7, emphasis in original. Second, there was no evidence of an improper motive in adopting the challenged provision or any awareness of a disparate effect from which discriminatory intent could be inferred.

Lyon is distinguishable on both grounds. *Arnett* involves unequal pension benefits, not an early retirement incentive plan. Unequal benefits are governed by ADEA section 4(f)(2)(B)(i) (29 U.S.C. § 623(f)(2)(B)(i)), which expressly adopts a principle of "equal benefit or equal cost" and provides that increased cost is the only justification for lower benefits to older workers. By contrast, early retirement incentive plans are governed by section 4(f)(2)(B)(ii) (29 U.S.C. § 623(f)(2)(B)(ii)), which requires only that such plans be "voluntary" and "consistent with the relevant purpose or purposes of the Act." See *Auerbach v. The Board of Educ.*, 136 F.3d 104, 112 (2d Cir. 1998). Moreover, the legislative history of section

21417 establishes the California Legislature knew the provision would reduce disability benefits for older-hired workers and intended that result. See Pet. App. 13.

Arnett is also not in conflict with *Solon v. Gary Community School Corp.*, 180 F.3d 844 (7th Cir. 1999), another early retirement incentive case. The Seventh Circuit found the *Solon* program violated the ADEA. Arguably there is a conflict between *Solon* and *Lyon*, but there is no conflict between those two early retirement cases and this unequal benefit case.

III. OTHER FACTORS, INCLUDING THE POSSIBLE REPEAL OF SECTION 21417, MAKE THE GRANT OF CERTIORARI INAPPROPRIATE.

Several additional circumstances militate strongly against the grant of certiorari.

First, a bill to repeal Government Code section 21417 is presently pending in the California Legislature. AB 448 was introduced during the 1999 legislative session, passed the Assembly 75-2, but was not voted on by the Senate. Co-sponsored by petitioner California Public Employees' Retirement System, the bill will be reconsidered during the next legislative session. Passage of AB 448 would sharply limit the significance of this case. AB 448's text is set forth in the appendix to this brief. App. 1.

Second, the Ninth Circuit decision in this case simply reversed the granting of a motion to dismiss and remanded the case for trial. Although plaintiffs may ultimately prevail, the case could also end in summary judgment, a verdict for the defendants, or in settlement. If the

issues raised by petitioners still survive at the time of final judgment, they will be more fully fleshed out and more appropriate for decision by this Court. The Court should decline to grant certiorari to review this interlocutory order. See *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

Third, the entire posture of this case may change based on this Court's pending decision in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S.Ct. 901 (1999). If the Court rules that federal courts do not have subject matter jurisdiction in ADEA actions brought by state employees, the *Arnett* plaintiffs could refile this action in state court under the California FEHA. The ADEA issues would be moot.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied in this unique case.

Respectfully submitted,

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APPENDIX

TEXT OF AB 448

SECTION 1. Section 21417 of the Government Code is repealed.

SECTION 2. The limitation on industrial disability allowances set forth in Section 21417 of the Government Code, which is repealed by this act, will be inapplicable to allowances first paid on and after the effective date of this act. Allowances paid to persons on and after the effective date of this act that have been previously limited by the operation of Section 21417 shall not be retroactively adjusted, but shall be recalculated and paid without the limitation on and after the effective date of this act.